Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-876

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on Behalf of the Navajo Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Navajo Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882,

Petitioner,

v.

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Hopi Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882, and EDWARD H. LEVI, Attorney General of the United States, on Behalf of the United States,

Respondents.

On Petition for
Certiorari to
the Court of
Appeals for the
Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE P. VLASSIS
1545 West Thomas Road
Phoenix, Arizona 85015
Attorney for Petitioner

Of Counsel:
LAWRENCE A. RUZOW
KATHERINE OTT
VLASSIS, RUZOW & LINZER

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	25

APPENDIX

A.	Opinion of Court of Appeals	App. A-1
B.	Order of District Court of January 25, 1974	App. B-1
C.	Order of District Court of May 29, 1974	App. C-1
D.	Order of District Court of October 14, 1975	App. D-1
E.	United States Constitution, Amendment V	App. E-1
F.	Act of July 22, 1958, 72 Stat. 403	App. F-1
G.	Act of December 22, 1974, 88 Stat. 1712	App. G-1
H.	Joint Use Law and Order Code, 25 C.F.R. §§12.2; 12.13; 12.139-152 (1976)	App. H-1
I.	General Grazing Regulations, 25 C.F.R. §151.15 (1976)	App. I-1
J.	Navajo Grazing Regulations, 25 C.F.R. §152.4 (1976)	App. J-1

APPENDIX—(Continued)

K. Navajo-Hopi Joint Use Area Grazing Regulations, 25 C.F.R. §§153.3; 153.17; 153.19 (1976) .... App. K-1

L. Navajo Tribal Code, Title 2 §983 (1972) .... App. L-1

M. Findings of Fact and Conclusions of Law of the District Court, September 7, 1972 .... App. M-1

N. Order of District Court of October 14, 1972 .... App. N-1

O. Writ of Assistance of the District Court of October 31, 1972 .... App. O-1

P. Order of District Court of April 23, 1973 .... App. P-1

Q. Order of Court of Appeals of July 11, 1975 .... App. Q-1

R. Order of District Court of October 14, 1975 .... App. R-1

S. Five Year Livestock Reduction and Land Restoration Plan of the Department of the Interior .... App. S-1

T. Land and Livestock Management Plan of United States, submitted pursuant to Order of District Court of October 14, 1972 and incorporated into Order of District Court of April 23, 1973 .... App. T-1

APPENDIX—(Continued)

U. Plan of United States, excluding matters relating to Land and Livestock Management, submitted pursuant to Order of District Court of October 14, 1972, and incorporated into Order of District Court of April 23, 1973 .... App. U-1

TABLE OF AUTHORITIES

CASES *Page*

American Newspaper Publishers Ass'n v. N.L.R.B., 190 F.2d 45 (7th Cir. 1951), *aff'd.* 345 U.S. 100 (1953) 22

Bell v. Burson, 402 U.S. 535 (1971) 21

Eisen v. Carlisle and Jacquelin, 417 U.S. 156 (1974) 21

F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 22

Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), *cert. denied* 381 U.S. 904 (1965) 22

Fuentes v. Shevin, 407 U.S. 67 (1972) 21

Goldberg v. Kelly, 397 U.S. 254 (1970) 21

Hamilton v. MacDonald, 503 F.2d 1138 (9th Cir. 1974) 5, 8

Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1972), *cert. denied* 406 U.S. 945 (1972) 4, 8

Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962), *aff'd.* 373 U.S. 758 (1963) 3, 8, 9

Int'l Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1967) 10

Menominee Tribe v. United States, 67 F.Supp 972 (Ct. Cl. 1946) 19

TABLE OF AUTHORITIES—(Continued)

CASES	*Page*
N.L.R.B. v. Red River Lumber Co., 109 F.2d 157 (9th Cir. 1940)	18
Potawatomi Indians v. United States, 391 F.2d 614 (Ct. Cl. 1967), *cert. denied* 389 U.S. 1046 (1968)	22
Schmidt v. Lessard, 414 U.S. 473, *per curiam* (1974)	11-12
Sherbert v. Verner, 374 U.S. 398 (1963)	21
Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969)	21
Speiser v. Randall, 357 U.S. 513 (1958)	21
Stanley v. Illinois, 405 U.S. 645 (1972)	21
Udall v. Littell, 366 F.2d 668 (D.C. Cir. 1966), *cert. denied* 395 U.S. 1007 (1967)	18
United States v. Camp, 169 F.Supp. 568 (E.D. Wash. 1959)	18, 19
United States v. Int'l Union, United Mine Workers of America, 89 F.Supp. 179 (D.D.C. 1950), *appeal dismissed*, 190 F.2d 865 (D.C. Cir. 1951)	18
United States v. Mechanic, 454 F.2d 849 (8th Cir. 1971), *cert. denied* 406 U.S. 929 (1972)	14
United States v. Southern Ry. Co., 364 F.2d 86 (5th Cir. 1966), *cert. denied* 386 U.S. 1031 (1967)	14
United States v. Tandaric, 152 F.2d 3 (7th Cir. 1945), *cert. denied* 327 U.S. 786 (1946)	14
United States v. Taystee Baking Company, 55 F.Supp. 490 (N.D. Tex. 1944)	18
Winton v. Amos, 255 U.S. 373 (1921)	20

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

U.S. Const. amend. V	3, 9, 10, 14
5 U.S.C. § 551 *et. seq.* (1964)	2, 10, 22
25 U.S.C. § 2 (1964)	18
28 U.S.C. § 1253 (1964)	12
28 U.S.C. § 1254(1) (1964)	2
Fed. R. Civ. P. 65(d)	2, 11, 12
Act of July 22, 1958, 72 Stat. 403	3
Act of December 22, 1974, 88 Stat. 1712	3, 7, 8, 9, 21, 22, 23
25 C.F.R. § 2.10 (1976)	10
25 C.F.R. § 2.22 (1976)	10
25 C.F.R. § 12.2 (1976)	3, 16
25 C.F.R. § 12.13 (1976)	3, 16
25 C.F.R. § 12.139-.152 (1976)	3, 16
25 C.F.R. § 151.2 (1976)	19
25 C.F.R. § 151.10 (1976)	14
25 C.F.R. § 151.15 (1976)	3, 10, 14, 20
25 C.F.R. § 152.4 (1976)	3, 16
25 C.F.R. § 152.9 (1976)	10
25 C.F.R. § 153.3 (1976)	3, 16
25 C.F.R. § 153.17 (1976)	3, 16
25 C.F.R. § 153.19 (1976)	3, 16
Navajo Tribal Code, Title 2 § 983 (1972)	3, 17
Navajo Tribal Code, Title 3 § 351 (1970)	14
Navajo Tribal Code, Title 3 § 353 (1970)	14
Navajo Tribal Code, Title 3 § 354 (1970)	14

OTHER AUTHORITIES

Summary Report Soil and Range Inventory of the 1882 Executive Order Area Exclusive of District 6 in Arizona, BIA Technical Report (1964) 19

Navajo Area Tuba City Agency District 5 Soil and Range Inventory, BIA Technical Report, (Undated) 8

H.R. 11128, 92nd Cong., 1st and 2nd Sess. (1972) 21

H.R. 1193, 93d Cong., 1st Sess. (1973) 21

H.R. 10337, 93d Cong., 2d Sess. (1974) 21

S. 2424, 93d Cong., 1st Sess. (1973) 21

S. 3230, 93d Cong., 2nd Sess. (1974) 21

S. 3724, 93d Cong., 2d Sess. (1974) 21

IN THE

Supreme Court of the United States

October Term, 1976

No. ________

Peter MacDonald, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on Behalf of the Navajo Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Navajo Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882,

Petitioner,

v.

Abbott Sekaquaptewa, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Hopi Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882, and **Edward H. Levi**, Attorney General of the United States, on Behalf of the United States,

Respondents.

On Petition for Certiorari to the Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Peter MacDonald, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 27, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, *Sekaquaptewa v. MacDonald,* F.2d (Civ. Nos. 74-1936, 74-2215, and 76-1006, Sept. 27, 1976) appears in the Appendix hereto [App. A], together with the unreported opinions of the District Court [Apps. B, C, D].

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether issuance of the original injunctive decree and subsequent civil contempt order of the District Court was violative of due process of law and Rule 65 (d) of the Federal Rules of Civil Procedure where such Court's decree, incorporating eighty-one pages of testimony, was so vague as to require clarification by the opposing party.

2. Whether grazing permits issued to individual Navajos by the Secretary of the Interior may be cancelled by a Court without following the procedure set forth in the Code of Federal Regulations for termination and cancellation of such permits.

3. Whether in the face of a clear Congressional mandate to the Secretary of the Interior to accomplish livestock reduction and land restoration in the Joint Use Area and given the provisions of the Administrative Procedure Act, a District Court may set aside a plan for livestock reduction and land restoration developed by the Department of the Interior and substitute its own plan for livestock reduction and land restoration.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The following are reproduced as appendices.

1. U.S. Const. amend. V [App. E]
2. Act of July 22, 1958, 72 Stat. 403 [App. F]
3. Act of December 22, 1974, 88 Stat. 1712 [App. G]
4. 25 C.F.R. § 12.2, 12.13, 12.139-152 (1976) [App. H]
5. 25 C.F.R. § 151.15 (1976) [App. I]
6. 25 C.F.R. § 152.4 (1976) [App. J]
7. 25 C.F.R. §§ 153.3, 153.17, 153.19 (1976) [App. K]
8. Navajo Tribal Code, Title 2 § 983 (1972) [App. L]

STATEMENT OF THE CASE

Pursuant to the Act of July 22, 1958, 72 Stat. 403 [App. F] the Hopi Indian Tribe sued the Navajo Indian Tribe and the Attorney General on behalf of the United States to determine the rights and interests of the respective tribes in the reservation established by an Executive Order of December 16, 1882 and to quiet title to that reservation. That action culminated in a judgment by a three-judge United States District Court that, subject to the trust title of the United States, the Navajo and Hopi Tribes, as to the land there involved, have joint, equal and undivided interests. *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd* 373 U.S. 758 (1963). In its 1962 opinion, the Court held that under the special jurisdictional statute it lacked power to partition the joint and undivided interests.

On March 13, 1970 the Hopi petitioned the District Court of Arizona for orders: (1) directing Petitioner and the Attorney General to forthwith grant the Hopi joint use and possession of the joint interest area and to remove Navajo livestock from the lands to accomplish such joint use without further damage to those lands; and (2) directing the

Clerk of the Court to issue a writ of assistance to allow the Hopi to enter upon the joint area and with the Navajo Tribe jointly and equally use and benefit from the grazing, forage and all other surface resources of the area for the benefit of the respective members of those tribes.

On August 3, 1970 the District Court, per one member of the three-judge panel, denied the Hopi petition, holding that the District Court, under the special jurisdictional Act, had no power to grant the relief requested.

The Court of Appeals reversed the order entered by the District Court in Petitioner's favor. *Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1972). Petition for certiorari to this Court was denied. 406 U.S. 945 (1972).

The District Court held hearings on the Hopi petition and issued its Findings of Fact and Conclusions of Law on September 7, 1972 [App. M]. The Court granted the Hopi petition and issued an Order of Compliance on October 14, 1972 [App. N] and a Writ of Assistance [App. O] on October 31, 1972.

The Order of October 14, 1972 [App. N] (1) directed Petitioner MacDonald, the Navajo Tribe, and the United States to commence and to complete within one year the reduction of Navajo livestock in the Joint Use Area to one-half of the carrying capacity of the area as determined by a 1964 Soil and Range Inventory; (2) provided that "no new construction shall be permitted on the Joint-Use Area without a permit issued jointly by the two tribes" [para. 7, Order of October 14, 1972, App. N]; and (3) directed the United States to make a new Range Reconnaissance to determine the present carrying capacity of the area and to present to the Court for its approval "a plan to facilitate and implement this Order."

The Order of October 14, 1972 [App. N] required a drastic, massive, livestock reduction: the nearly 12,000 Navajos living in this area were to keep only 8,139 of their estimated 120,000 sheep units.

Petitioner appealed from the Order of Compliance of October 14, 1972 [App. N]. The Court of Appeals upheld the District Court. *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974).

On April 23, 1973, the District Court approved and adopted by reference the livestock reduction plans submitted by the United States on December 14, 1972 pursuant to paragraphs 8 and 9 of the Order of October 14, 1972 [App. N]. The Order of April 23, 1973 [App. P] incorporated eighty-one pages of testimony of Irving Schwartz, then a Resource Development Specialist for the Department of the Interior.

On July 17, 1973, the Hopi Tribe moved to cite Petitioner for contempt for the non-attainment of the goals set by the Court in its Orders of October 14, 1972 [App. N] and April 23, 1973 [App. P]. The District Court entered an Order on July 19, 1973 directing Petitioner to appear on August 25, 1973 and show cause why he should not be cited for contempt. The hearing was held but no order issued therefrom.

On August 30, 1973, the Hopi Tribe filed a motion to implement the order of October 14, 1972 [App. N].

On October 17, 1973, the United States moved to extend the time for compliance with the District Court's Order of October 14, 1972 [App. N] to October 14, 1974. Petitioner supported the Government's motion in a cross-motion submitted November 20, 1973, but asked that the time for compliance be extended to October 14, 1975. The Respondent filed objections to both motions.

On December 1, 1973, a hearing was held on these motions. Thereafter, on January 16, 1974, the United States lodged a proposed order with the District Court. On January 19, 1974, the Petitioner objected to the proposed order. On January 25, 1974, the District Court issued an order [App. B] denying both motions, overruling Petitioner's objections, and clarifying its Order of Compliance of October 14, 1972 [App. N] by ordering that grazing permits covering the Joint Use Area were judicially cancelled as of October 14, 1973 by the Court's Order of October 14, 1972 [App. N]. Appeal No. 74-1936 was taken from this Order.

On March 30, 1974, Respondent filed an amended Motion to Cite for Contempt for Failure to Obey Order of Compliance and Writ of Assistance which sought to cite for contempt *both* Chairman MacDonald and the Navajo Tribe.

On April 16, 1974, Petitioner moved to stay the execution of paragraphs 1, 2, 3 and 4 of the Order of October 14, 1972 [App. N] and paragraph 1 of the Order of January 25, 1974 [App. B] pending appeal of these orders. This motion was denied by the District Court on April 26, 1974.

After a hearing on the motion of March 30, 1974 followed by the filing of briefs, proposed findings of fact and conclusions of law and objections thereto, on May 29, 1974, the District Court entered an Order [App. C]: (1) holding Petitioner MacDonald and the Navajo Tribe in contempt for failing to reduce an estimated 120,000 sheep units down to 8,139 sheep units and for failing to prevent 12,000 people living in wooden stick hogans from constructing *any* new or replacement shelters for an indefinite period; (2) ordering them to commence such livestock reduction "without regard to the voluntary compliance of individual Indians" [para. 2, Order of May 29, 1974, App. C]; (3) fining them $250 per day until the livestock of the Navajo Indians in the Joint Use Area is reduced to 8,139 sheep units year round; and (4) allowing Respondent Hopi Tribe to recover costs and attorneys' fees incurred in the contempt proceedings from Chairman MacDonald and the Navajo Tribe in an amount to be fixed by the Court. It is from this contempt judgment that Appeal No. 74-2215 was taken.

On June 24, 1974, Petitioner sought expedition of the appeal from the contempt citation and further sought a stay of the order pending the appeal.

On July 3, 1974, the Court of Appeals granted the motion for an expedited appeal and denied the motion for a stay.

On December 22, 1974, after the contempt appeal had been expedited but before it came on for oral argument, the Congress enacted Pub.L. 93-531, 88 Stat. 1712 [App. G].

On July 11, 1975, Appeals No. 74-1936 and 74-2215 came on for oral argument before the Court of Appeals but both appeals were remanded [App. Q] to the District Court to determine the effect of the Act of December 22, 1974, 88 Stat. 1712 [App. G] upon them.

On August 16, 1975, pursuant to the remand, a hearing was held by the District Court to determine the effect of the Act of December 22, 1974, 88 Stat. 1712 [App. G] on the livestock reduction orders of the Court.

On October 14, 1975, the Court issued two Orders with respect to these proceedings. The first Order [App. R] determined that the Act of December 22, 1974, 88 Stat. 1712 [App. G] did not affect those Orders appealed from in Appeals No. 74-1936 and 74-2215.

The second order of October 14, 1975 [App. D] entered pursuant to the motion filed by the Hopi Tribe, directed the United States to proceed with the reduction of livestock in the Joint Use Area without regard to the voluntary compliance of the individual Indians.

Appeal No. 76-1006 was taken from the second Order of October 14, 1975 [App. D]. The United States filed a separate appeal which was later withdrawn.

On June 4, 1976 Appeals No. 74-1936, 74-2215 and 76-1006 came on for oral argument before the Court of Appeals for the Ninth Circuit.

On September 27, 1976 the Court of Appeals entered a judgment and opinion [App. A] upholding the District Court in each of the three appeals then before it; that relating to the cancellation of grazing permits (No. 74-1936), that relating to a contempt citation (No. 74-2215), and that relating to the Act of December 22, 1974, 88 Stat. 1712 [App. G] (No. 76-1006).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided Federal questions in a manner that conflicts with the applicable decisions of this Court requiring the exercise of this Court's power of supervision.

In most controversies, it is appropriate to begin by setting forth what is at issue. In this case, under the special circumstances presented, it is more appropriate to set forth what is not in issue.

It is not in issue that the Navajo and Hopi Tribes, subject to the trust title of the United States, have joint, equal and undivided interests in the 1882 Executive Order Reservation. *Healing v. Jones, supra.*

It is also not in issue that the District Court has power to effectuate the decision of the three-judge *Healing* Court. *Hamilton v. Nakai, supra.* Nor is it in issue that requiring livestock reduction, restricting Navajo construction, and ordering cancellation of grazing permits is an appropriate manner in which the Court can implement the *Healing* decision. *Hamilton v. MacDonald, supra.*

It is not in issue that Petitioner did not reduce the livestock from an estimated 120,000 sheep units[1] to 8,139 sheep units as directed by the Court in the Order of October 14, 1972 [App. N]. Nor is it in issue that Petitioner did not totally prevent construction in the Joint Use Area as that Order required him to do. In fact, in the one and one-half years since the Order of October 14, 1972 [App. N] prohibited construction in an area of 1.8 million acres, the 12,000 residents had apparently constructed twenty new or replacement structures, mostly one-room wooden shelters or stick corrals.

It is not in dispute that the *Healing* Court in 1962 recognized its inability to partition the Joint Use Area precluded a full and final settlement of the Navajo-Hopi land dispute. *Healing v. Jones, supra* at 105.[2] It should also not be in dispute that a major purpose of the Act of December 22, 1974, 88 Stat. 1712 [App. G] was to remedy this absence of jurisdictional authority to partition by permitting but not requiring partition as a possible solution to this land dispute. Nor should it be in dispute that this Act was further intended to remedy the failure of the United States and the Navajo Tribe to achieve livestock reduction to the level dictated in the District Court's Order of October 14, 1972 [App. N].

Finally, it should not be in dispute that in order to provide for livestock reduction in accordance with a mandate under § 19(a) of the Act of December 22, 1974, 88 Stat. 1712 [App. G], the United States developed and is implementing a detailed five year livestock reduction and land restoration plan [App. S].

What is in dispute is: (1) whether the conduct of Navajo Tribal Chairman, Peter MacDonald, in seeking to carry out the Court's Order of October 14, 1972 [App. N], as well as its subsequent orders, was such as to justify a finding of contempt in view of the now apparent failure to achieve the livestock reduction which the Court ordered and in view of the orders' ambiguous and vague nature contravening the proscription of the Fifth Amendment of the United States Constitution, (2) whether the decisions of this Court permit the District Court to cancel grazing permits by judicial fiat, when Federal Regulations exist which identify the Secretary of the Interior as the party with sole authority to grant and revoke such permits on Indian trust land[3] and when the individual Indians affected by the Court's action were not given notice and an opportunity to be heard as these Federal Regulations and as the due process clause of the Fifth Amendment to the United States Constitution require; and (3) whether the decisions of this Court permit the District Court to supplant a comprehensive plan for livestock reduction and land restoration [App. S] developed by the Secretary of the Interior pursuant to a Congressional mandate without the careful review required by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1964), and without a direction to the Secretary as to how to bring the plan into compliance with the law.

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[1] A "sheep unit" is a term used by the Bureau of Indian Affairs to count livestock. The BIA definition of "sheep unit" is one mature ewe with lamb or their equivalent. *Navajo Area Tuba City Agency District 5 Soil and Range Inventory*, BIA Technical Report at 108 (undated).

[2] "[T]he facts and law, as herein determined and applied, and our lack of jurisdiction to partition jointly-held lands, preclude a complete resolution of the Hopi-Navajo controversy."

An analysis of the contempt issue requires a review of at least three elements as they relate to this Court's consistent and clear decisions on the use of the contempt power: First, what was the nature of the Court's order? Second, what are the economic and political realities of the affected area and the affected people? Third, what were the efforts made by Chairman MacDonald?

A contempt citation must be based on violation of a specific directive or an unequivocal prohibition, untainted by ambiguity and not susceptible to differing interpretations.[4] The Order of October 14, 1972 [App. N] is the order from which the contempt judgment of May 29, 1974 [App. C]

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[3] The grazing permits in question were granted by a BIA official pursuant to 25 C.F.R. § 152.9 (1976). The consent of the permit-holder and the approval of a BIA official are required for assignment of these permits to another party, 25 C.F.R. § 151.15 (1976) [App. I]. These permits may be modified or cancelled by a BIA official upon thirty days written notice, 25 C.F.R. § 151.15 (1976). The permit-holder affected by the actions of a BIA official has an opportunity to appeal such actions by filing a written statement with the appropriate person pursuant to 25 C.F.R. §§ 2.10, 2.22 (1976).

[4] In *Int'l Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967) this Court noted that:

> We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate.

stems. The 1972 Order required Petitioner to reduce most of the livestock owned by the 12,000 Navajos in the Joint Use Area in accordance with a plan to be later submitted to the Court by the United States. Thus, the Order directed Petitioner to achieve a result when the method by which it might be accomplished had yet to be formulated.

The Order of April 23, 1973 [App. P], from which the contempt judgment of May 29, 1974 [App. C] also stems, adopted two plans submitted by the United States. The Order incorporated the two plans by reference and further incorporated eighty-one pages of testimony of a BIA representative (Mr. Irving Schwartz) explaining and delineating the voluntary livestock reduction plan.

This incorporation by reference is directly contrary to the express requirements of Rule 65(d) of the Federal Rules of Civil Procedure which provides, in relevant part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; *shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document,* the act or acts sought to be restrained . . . . (Emphasis supplied.)

The testimony of Irving Schwartz before the District Court on March 3, 1973 could hardly be termed specific, detailed or capable of being observed in the absence of several million dollars of federal funds.[5] This Court in *Schmidt*

> We deal instead with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension. 389 U.S. at 76.

[5] On page 9 of the 81 pages of testimony of Irving Schwartz incorporated into the Order of April 23, 1973 [App. P], the United States Attorney questioned Mr. Schwartz:

> Q. Mr. Schwartz, in paragraph 1-a of what I will refer to as the 60-day plan there have been complaints that it is vague. *Was this vagueness deliberate?*
>
> A. *It was*, for the reason that we had several imponderable situations there . . . . (Emphasis supplied.)

v. Lessard, 414 U.S. 473, *per curiam* (1974), in a case determining whether the injunctive terms of an order were sufficient to invoke this Court's appellate jurisdiction under 28 U.S.C. § 1253 (1964), held that:

> [T]he specificity provisions of Rule 65(d) are no mere technical requirements. *The rule was designed* to prevent uncertainty and confusion on the part of those faced with injunctive orders, and *to avoid the possible founding of a contempt citation on a decree too vague to be understood.* (Citations and footnote omitted.) (Emphasis supplied.) 414 U.S. at 476.

The need for the Rule prohibiting incorporation by reference is particularly apparent from the subsequent history of the Order of October 14, 1972 [App. N] and the Order of April 23, 1973 [App. P]. The incorporated plans and eighty-one pages of testimony gave rise to such confusion on all sides that the *Hopi Tribe* sought clarification on August 30, 1973 with a motion:

> . . . based upon the grounds that facts, circumstances and evidence now before the court *illustrate the necessity for more specific instructions to Defendant Peter MacDonald* to effectuate the Order of Compliance dated October 14, 1972. (Emphasis supplied.)

The necessity for "more specific instructions" derives from ambiguities inherent in the Order of October 14, 1972 [App. N] and from apparent conflicts between the plans

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On page 76 of the testimony the attorney for Petitioner questioned Mr. Schwartz:

> Q. . . . We are just left at sea.
>
> A. Mr. Vlassis, I thoroughly agree with you that *the thing is vague, that it needs clarification* and should be clarified at the outset, it should be done immediately . . . . (Emphasis supplied.)

In fact, at the outset of the hearing the Court states on page 2 of the 81 pages that:

> [T]he government has filed some plans or outlines of plans, which apparently the other counsel [for the Navajo and Hopi Tribes] *both* find obscure. (Emphasis supplied.)

and the Order and the eighty-one pages of testimony and the Order.

The Order of October 14, 1972 [App. N] failed to indicate whether the grazing permits were to be deemed cancelled by judicial fiat or whether the Secretary of the Interior was required to follow established administrative procedures to effect their cancellation. The first of the government plans [App. T] adopted by the Court in its Order of April 23, 1973 [App. P] permitted Navajo families to retain livestock essential for daily livelihood, yet the Order of October 14, 1972 [App. N] required Petitioner and the United States to reduce Navajo livestock to one-half the carrying capacity of the range seemingly without regard to the numbers of livestock needed for mere survival of the Indians. (The order of May 29, 1974 [App. C] citing Petitioner for contempt makes reference to the carrying capacity standard and omits any qualification for survival of those whose animals are taken.) Furthermore, the testimony incorporated by the Court to explain the government plans plainly indicated that the livestock reduction program was voluntary not mandatory.[6] The Order of April 23, 1973 [App. P], in effect, directed the parties to abide by a livestock reduction plan which the Court itself, by the reference to and incorporation of Mr. Schwartz' testimony, had specifically characterized as voluntary in nature.

This Court has long supported the principle that a law which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the due process clause of the Fifth Amendment to the United States Constitution.[7]

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[6] On pages 7 and 8 of the 81 pages of the March 3, 1973 testimony incorporated into the Order of April 23, 1973 [App. P], Mr. Schwartz stated:

> Right from the start of this project it was stated . . . to the Navajo people themselves that whatever program was suggested that it would be upon a voluntary basis . . . .
>
> . . . .
>
> And we have been trying to work out a program that would avoid [the catastrophic experiences of stock reduction in the 1930's], that *it be a voluntary process rather than a mandatory process.* (Emphasis supplied.)

The terms of the Orders of October 14, 1972 [App. N] and April 23, 1973 [App. P] are vague. *All* parties have guessed at the meaning of the incorporated government plans (see note 5 *supra*). Indians, through the Fifth Amendment to the United States Constitution, are guaranteed due process of law which the Court has violated by issuing these orders and by holding Petitioner in contempt for lack of compliance.

The orders of the District Court failed to recognize that both the livestock which it ordered to be drastically reduced and the grazing permits which it ordered cancelled were the personal property of the individual Indians living in the Joint Use Area and not Tribal property to be disposed of in an adjudication of a tribal claim to land.[8] Petitioner was without governmental or practical authority to effect the Court's Orders relating to the reduction of livestock (which are the personal property of his constituents) or to the cancellation of grazing permits (an act which lies solely within the province of the Secretary of the Interior, 25 C.F.R. § 151.15 (1976)).

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[7] See *e.g. United States v. Tandaric*, 152 F.2d 3 (7th Cir. 1945), *cert. denied* 327 U.S. 786 (1946); *United States v. Southern Ry. Co.*, 364 F.2d 86 (5th Cir. 1966), *cert. denied* 386 U.S. 1031 (1967); *United States v. Mechanic*, 454 F.2d 849 (8th Cir. 1971), *cert. denied* 406 U.S. 929 (1972).

[8] On page 71 of the 81 pages of the March 3, 1973 testimony of Irving Schwartz incorporated into the Order of April 23, 1973 [App. P], a colloquy between the attorney for Petitioner and Mr. Schwartz verified that the animals are the personal property of the individual Navajos.

> Q. When you say "those people" who are you referring to?
>
> A. The people who own the animals.
>
> Q. On an individual basis?
>
> A. Oh, yes.

The personal property nature of the grazing permits is acknowledged by the federal grazing regulations in 25 C.F.R. §§ 151.10, 151.15 (1976) and by the Navajo Tribal Code, Title 3, §§ 351, 353, 354 (1970).

Even if Petitioner had had the requisite governmental authority to accomplish the Court's directives, it was unreasonable and impossible to attempt to exact full compliance. The livestock owned by the 12,000 residents of the Joint Use Area were to be reduced from 120,000 sheep units to 8,139. This was to be accomplished without funding for a reduction program, and, of infinitely greater importance, without funding to provide subsistence to those whose livelihood would be destroyed.

The Orders of October 14, 1972 [App. N] and April 23, 1973 [App. P] were premised on the active participation of the government[9] which itself maintained that it lacked the necessary financial resources, although admittedly it had the authority necessary to accomplish the objectives of the Court. The aid of the United States, as trustee, could not be forthcoming; in fact, it failed to implement its own reduction plan which the Court had adopted, for the simple reason that no appropriation had been made available.

The District Court through its contempt judgment has attempted to penalize Chairman MacDonald and the Navajo Tribe for the failures of the United States. The judgment was intended to coerce Chairman MacDonald and the Navajo Tribe to accomplish what the United States, the author and the cause of the reduction plan, declared to be impossible of achievement in its Motion to Amend Order filed with the District Court on October 17, 1973, and stating, in relevant part: "there is *no feasible method by which the United States can comply* with the objectives set forth in Paragraphs 1, 2, 3 and 4 of the Order of Compliance of October 14, 1972, by October 14, 1973." (Emphasis supplied.)

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[9] On page 60 of the 81 pages of the March 3, 1973 testimony of Irving Schwartz incorporated into the Order of April 23, 1973 [App. P], the attorney for Petitioner noted that the Navajo Tribal Code gave no authority for ordering the removal of livestock from the individual owners to which the Court replied:

> "No, I imagine the way it would have to be accomplished would be to have the United States as the trustee for both parties to accomplish that."

Testimony presented at the District Court hearings of March 3, 1973, September 14, 1973, and April 20, 1974 established that with limited authority and no funds Petitioner made the following efforts to comply with what Petitioner understood might be the intent of the directives of the Court. He encouraged additional voluntary livestock sales in the Joint Use Area by every available means. He directed, through the Navajo-Hopi Land Dispute Commission, and the Range and Livestock Department of the Navajo Tribe, that such livestock sales be conducted. Several sales were in fact conducted.

The Grazing Regulations and the Law and Order Regulations that were eventually published and adopted by the Secretary of the Interior showed the intention and the need for exertion of sole authority over the Joint Use Area. See 25 C.F.R. §§ 12.2, 12.13, 12.139-.152 (1976) [App. H] and 25 C.F.R. §§ 153.3, 153.17, 153.19 (1976) [App. K]. See also 25 C.F.R. §152.4 (1976) removing the Joint Use Area from the scope of the Navajo Grazing Regulations as of September 19, 1969 [App. J].

The Court found that although Petitioner did bring to the attention of the Navajos living in the Joint Use Area that the Order of October 14, 1972 [App. N] prohibited new construction, he failed to prevent *all* such construction by the 12,000 Navajo residents. The Court found that at least twenty structures have been erected in an area larger than the State of Delaware.

The evidence presented at the March 3, 1973, September 14, 1973 and April 20, 1974 hearings, however, demonstrates that, in fact, Petitioner issued instructions to all Tribal Agencies that no Tribal funds should be made available for new construction in the Joint Use Area. Indeed, construction funded by the Tribe which commenced *prior* to the issuance of the Court order was halted.

Petitioner and the Navajo Tribe advised the Navajo residents of the Joint Use Area that new hogans (the traditional one-room shelters of the Navajo people) should not be built without first obtaining the approval of the Hopi Tribal Council. The people were told that if they needed to repair their hogans, the Tribal government would help them do what was necessary to request the approval of the Hopi Tribe for such construction.

Petitioner directed the Navajo-Hopi Land Dispute Commission (a governmental body created by the Navajo Tribal Council for such matters) to investigate allegations of new construction and to advise those engaged in the construction of hogans of the existence of the Court order prohibiting such activity.

There are approximately 3,000 hogans in the Joint Use Area. Were the Court correct in concluding that there were 20 cases of apparent new construction, this would be less than 1% of the sticks and mud hogans which provide shelter for 12,000 Navajos in the Joint Use Area. Again it was unreasonable to have expected total compliance with the Order of October 14, 1972 [App. N].

The Hopi Tribe has argued that Petitioner could initiate criminal prosecution of those Navajos who violate the orders of the Court, yet the fact is the Navajo Tribal Code clearly places this responsibility on the Office of the Prosecutor who has the responsibility *"of acting independently and upon his own authority* within the guidance of law and professional ethics in the performance of his duties." (Emphasis supplied.) Navajo Tribal Code, Title 2, § 983 (1972) [App. L].

Nor can a contempt judgment be properly based upon the limited *representative* capacity of Petitioner and the Navajo Tribe in these proceedings. Representative officials, even those with greater authority than that of Chairman MacDonald and the Navajo Tribe in the case here presented, should not be charged with contempt even for the wrongful action of those whom they represent, unless it is shown that the representative official had the ability to effect compliance and failed to do so and further shown that the actions by those represented were the result of direct interference or the direction of the representative official.[10]

Even had the incorporated livestock reduction plan been explicit, the ability of Petitioner to comply with the Court's Orders of October 14, 1972 [App. N] and April 23, 1973 [App. P] is severely circumscribed by the limited authority granted him within the Navajo system of tribal government. A court order directing Petitioner to accomplish that which is beyond his lawful authority does not serve to expand his authority to meet the needs of the Court. Petitioner's ability to comply is further limited by the centuries-old traditions of his people who acknowledge little authority in their leaders. Neither of these limiting factors was removed by the Court when its Order of October 14, 1972 [App. N] directed Petitioner to accomplish that which was for him, and the Navajo Tribe as a whole, a practical and governmental impossibility.

The cancellation of grazing permits requires an understanding both of the value of the permits to those who hold them and of the long-established federal procedures (see note 3 *supra*) for dealing with such permits. Since before 1868 when the Navajo Reservation was established, the Navajos have lived by raising livestock. This is the main source of livelihood of the Navajos in the Joint Use Area. With the establishment of the Reservation came the Indian agent and federal supervision of trust resources, protection of which has long been held by this Court to be the responsibility of the Secretary of the Interior. *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966), *cert. denied* 385 U.S. 1007 (1967); *United States v. Camp*, 169 F.Supp. 568 (E.D. Wash. 1959). See also 25 U.S.C. § 2 (1964). This responsibility was recognized by the District Court in its Findings of Fact and Conclusions of Law of September 7, 1972 [para. 24, Findings of Fact, App. M].

The non-delegable responsibility to protect Indian trust resources is fiduciary in nature. See *United States v. Camp*, *supra; Menominee Tribe v. United States*, 67 F.Supp. 972 (Ct.Cl. 1946); 25 C.F.R. § 151.2 (1976).

A grazing permit entitles its holder to graze a specific number of sheep on designated trust land. The permit system was developed by the Secretary of the Interior to regulate the numbers of livestock being grazed by individual Indians on trust land, and the permits constitute an integral part of range management as practiced by the Department of the Interior in fulfillment of its fiduciary responsibility to protect Indian trust resources. In the Joint Use Area, such protection has been a total failure.

The August 8, 1972 hearing before the District Court, upon which the Findings of Fact and Conclusions of Law of September 7, 1972 [App. M] were based, in part, clearly established that the Department of the Interior granted permits for some 68,393 sheep units in an area which their own range reconnaissance study of 1963-1964 had shown could only support 22,000 sheep units.[11]

These grazing permits were issued by the Department of the Interior. It is equally clear that regulations exist for modification or cancellation of these permits. 25 C.F.R. § 151.15 (1976) [App. I]. In this Order of October 14, 1972 [App. N], the District Court cancelled the grazing permits as of October 14, 1973 and provided for the issuance of new permits. This could only be done by the party which had issued the permits in the first place, the Secretary of the Interior. In fact, the Secretary did neither.

Even had it been possible to cancel the permits by judicial fiat, the ambiguities inherent in the Order of October 14, 1972 [App. N] prevented any such cancellation from becoming effective. These ambiguities were brought to the attention of the District Court by the United States which was unsure whether the Order meant the permits were to be deemed judicially cancelled as of October 14, 1973 or whether the Order meant the United States was required to pursue the cancellation by making application to the Secretary of the Interior in accordance with the Grazing Regulations promulgated for the Joint Use Area, 25 C.F.R. § 151.15 (1976).

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[10] See, *e.g.*, *N.L.R.B. v. Red River Lumber Co.*, 109 F.2d 157 (9th Cir. 1940); *United States v. Int'l Union, United Mine Workers of America*, 89 F.Supp. 179 (D.D.C. 1950), *appeal dismissed*, 190 F.2d 865 (D.C. Cir. 1951); *United States v. Taystee Baking Company*, 55 F.Supp. 490 (N.D. Tex. 1944).

[11] *Summary Report Soil and Range Inventory of the 1882 Executive Order Area Exclusive of District 6 in Arizona*, BIA Technical Report at 12 (1964).

As a result of the evident confusion surrounding the Order of October 14, 1972 [App. N], the Hopi Tribe sought clarification with an August 30, 1973 motion that eventually led to the Order of January 25, 1974 [App. B]. This Order directed that the permits were deemed cancelled as of the preceding October.

Grazing permits are personal, not Tribal, property (see note 8, *supra*) and the facts relating to each existing permit-holder might well vary. It was, therefore, incumbent upon the Department of the Interior to cancel permits and issue new ones only by strict observance of the permit cancellation procedures in the Federal Regulations which the Secretary had himself promulgated. This was not done.

It was within the power of the United States and no one else, as issuer of the permits and as the party with authority, to cancel them in accordance with the Order of October 14, 1972 [App. N]. Such failure on the part of the United States is poor justification indeed for the blanket cancellation of all permits by judicial fiat in total disregard of the due process rights of the affected Indians guaranteed them by both the Fifth Amendment and Federal Regulations.

In the half-century since the 1921 decision relied on by the Court of Appeals, *Winton v. Amos*, 255 U.S. 373 (1921), the decisions of this Court have made it clear that the personal, not Tribal, rights conferred by the grazing permits

may only be terminated with strict adherence to due process guarantees.[12]

Expediency cannot justify the clear failure of the District Court to provide due process to the holders of permits cancelled by judicial fiat.

A multiplicity of legislative proposals were advanced by a variety of Congressional sponsors in the 92d and 93d Congresses concerning this land dispute.[13] Thus, the Congress was clearly aware at the time it approved the Act of December 22, 1974, 88 Stat. 1712 [App. G] that the District Court had as yet been unable to achieve the livestock reduction goal set by the Order of October 14, 1972 [App. N]. The Congress, recognizing the special expertise of the Department of the Interior and the lack of facilities, funds and personnel in the Courts of the United States to supervise a massive livestock reduction program with the concomitant social and economic upheaval, delegated to the Secretary of the Interior both authority and responsibility for livestock reduction with appropriate funding:

> "Notwithstanding any provision of this Act, or any order of the District Court pursuant to section 3 or 4, *the Secretary is authorized and directed to immediately commence reduction* of the numbers of all the

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[12] *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974) (due process requires notice be given to all members of a class); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process requires notice and an opportunity to be heard be provided a welfare recipient before benefits can be terminated); *Bell v. Burson*, 402 U.S. 535 (1971) (due process requires notice and an opportunity to be heard be provided an uninsured motorist before a State can revoke his license following an automobile accident); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (due process requires notice and an opportunity to be heard be provided affected parties before they can be deprived of possession of chattels under a prejudgment replevin statute). See also *Stanley v. Illinois*, 405 U.S. 645 (1972); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Speiser v. Randall*, 357 U.S. 513 (1958).

[13] H.R. 11128, 92d Cong., 1st and 2d Sess. (1972); H.R. 1193, 93d Cong., 1st Sess. (1973); H.R. 10337, 93d Cong., 2d Sess. (1974); S. 2424, 93d Cong., 1st Sess. (1973); S. 3230, 93d Cong., 2d Sess. (1974); and S. 3724, 93d Cong., 2d Sess. (1974).

livestock now being grazed upon the lands within the joint use area." Sec. 19(a) of the Act of December 22, 1974, 88 Stat. 1712 [App. G]. (Emphasis supplied.)

Congress thought it necessary to authorize a $10,000,000 appropriation to implement § 19 of the Act of December 22, 1974, 88 Stat. 1712 [App. G]. In contrast, the District Court required Chairman MacDonald to effect this same reduction of livestock but could not provide funds with which he might accomplish the drastic mandate.

The Congress has established clear procedures through the Administrative Procedure Act, 5 U.S.C. §§ 558(c), 706 (1964), for parties to challenge departmental or administrative action which they believe to be not in keeping with the departmental or agency mandate. This Court has traditionally deferred to administrative expertise.[14]

In this instance, the October 14, 1975 decision of the District Court affirmed by the Court of Appeals in Appeal No. 76-1006 flies in the face of both the Administrative Procedure Act and its consistent interpretation by this Court. It has never been determined that the District Court, in light of 5 U.S.C. § 701(a)(2) (1964) prohibiting judicial review of acts committed to agency discretion, had jurisdiction to review the Five-Year Plan of the Secretary of the Interior which was drafted to fulfill the mandate of § 19(a) of the Act of December 22, 1974, 88 Stat. 1712 [App. G]. Even if the Court could have properly reviewed the Five-Year Plan [App. S], its jurisdiction was limited to a determination that the Plan was lacking in some respect and an order remanding the Plan to the Secretary of the Interior with specific instructions as to how the Plan might be brought into compliance with applicable law. The Court has persisted in its attempts to implement its own plan, thus thwarting the effectiveness of the Five-Year Plan [App. S] established by the Secretary pursuant to the mandate given in § 19(a) of the Act of December 22, 1974, 88 Stat. 1712 [App. G].

That the problems confronting the District Court were and are immense cannot be denied. That they are extraordinary can be seen from the decision of Congress to pass a second Act on the same subject, seeking to provide a final solution to problems created in the first instance not by the Navajos and Hopis, but by the inaction of twenty-seven consecutive Secretaries of the Interior.

The efforts of the District Court, affirmed by the Court of Appeals, have not been in keeping with the due process requirements of our Constitution. Punishing a Tribal leader for failure to achieve that which was impossible to achieve without several million dollars of federal funding can surely be no deterrent to others in similar situations. Punishing a Tribal leader for failure to obey an order that was so vague that the party which sought it also required its clarification creates that trap for the unwary which this Court has repeatedly said is a misuse of the judicial power. Here the potent force of the contempt power, law both written and enforced by the Courts, has indeed become a deadly weapon.

Due process requires that the individual Navajo permitholders, whose very livelihood is dependent on their livestock, be entitled to more than a blanket cancellation of their permits by judicial fiat. While the Joint Use Area is badly overgrazed, the District Court was not justified in its efforts at fashioning a remedy which bypassed all due process proscriptions.

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[14] *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964), *cert. denied* 381 U.S. 904 (1965) (holding that even where a department or agency has, in fact, acted improperly, it is not the responsibility of the reviewing court to rewrite departmental policy or plan, but instead to require the offending department or agency to make another attempt at operating within its mandate); *American Newspaper Publishers Ass'n v. N.L.R.B.*, 190 F.2d 45 (7th Cir. 1951), *aff'd.* 345 U.S. 100 (1953) (a newspaper publisher's association sought relief from an administrative order of the National Labor Relations Board and the Court of Appeals held that if the Board had improperly applied law, the Court would not fashion a remedy but would remand the case to the Board with instructions to do so within the framework of the indicated principles of law); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) (holding that the function of the reviewing court ends when an error of law is laid bare, for at that point the matter must be returned to the administrative authority for reconsideration); and *Potawatomi Indians v. United States*, 391 F.2d 614 (Ct.Cl. 1967), *cert. denied* 389 U.S. 1046 (1968) (holding that if an administrative official would have room to choose, the court should remit the case to allow that discretion to be exercised).

The procedures required by due process are often costly, rarely expedient and may result in the same ultimate determination as those made and enforced in the absence of due process. Procedural due process is nonetheless at the foundation of our system of government and central to the Constitution.

In plainest terms, a dispute imposed between two Indian Tribes by the Federal Government has been resolved by the Courts below in ordering the Navajo Tribe to "voluntarily" eliminate forthwith its main source of subsistence in the Joint Use Area, the Tribe being unable to either understand the 81 page order or voluntarily starve, it is then cited for contempt as if it were the contumacious headquarters of John L. Lewis in his prime.

No one else can join in this petition because no one else is affected — only several thousand Navajos who have once again understood that their guardian is harsh indeed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

GEORGE P. VLASSIS
1545 West Thomas Road
Phoenix, Arizona 85015
Attorney for Petitioner

December 23, 1976

Of Counsel:

LAWRENCE A. RUZOW
KATHERINE OTT
VLASSIS, RUZOW & LINZER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Abbott Sekaquaptewa, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Hopi Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882,

Plaintiff-Appellee,

vs.

Peter MacDonald, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Navajo Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882,

Defendant-Appellant.

Edward H. Levi, Attorney General of the United States, on Behalf of the United States,

Defendant.

No. 74-1936
74-2215
76-1006

OPINION

[September 27, 1976]

Appeal from the United States District Court
for the District of Arizona

Before: ELY and WALLACE, Circuit Judges, and
CRARY, District Judge.*

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*Honorable E. Avery Crary, Senior United States District Judge for the Central District of California, sitting by designation.

CRARY, District Judge:

The three consolidated appeals here before the court are the most recent in the line of cases, the genesis of which is the Executive Order of December 16, 1882, creating a Hopi and Navajo Reservation of some 2,500,000 acres in northeastern Arizona. The portion of the Reservation in controversy is the area designated as the joint use area of the two tribes. In *Healing v. Jones,* 174 F.Supp. 211 (D.C. Ariz., 1959) (Healing I), a Three-Judge District Court first decided that the determination of the Tribes' equitable rights and interests in the Reservation lands presented a justiciable question and hence the Act conferring jurisdiction (Act of July 22, 1958) was a proper exercise of Congressional power. The Three-Judge Court in *Healing v. Jones,* 210 F.Supp. 125 (D.C.Ariz., 1962), Aff'd 373 U.S. 758 (1963), (Healing II), decided on the merits that the Hopi was entitled to exclusive possession of a portion of the Reservation (Land Management District 6) and that as to the remainder, the joint use area, the two tribes had joint, undivided and equal interests, subject to the trust title of the United States.

The District Judge, Chief Judge Walsh, whose orders are involved in each of the three appeals before this Court, was a member of the Three-Judge Court in Healing I and II.

The Navajo far outnumber the Hopi and over the years had taken over the area of the Reservation to a great extent. Neither the Government nor the Navajo sought to comply with the decree of the District Court, and in 1970 the Hopi Tribe petitioned the District Court for an order of compliance or writ of assistance to enforce its rights in the Reservation area. The District Court denied the petition on the grounds it did not have jurisdiction to issue the order or writ. By decision in *Hamilton v. Nakai,* 453 F.2d 152, 162 (9th Cir. 1971) (Hamilton I), this Court reversed and remanded the matter holding that the District Court had jurisdiction and authority to issue a writ to enforce the judgment in Healing II, supra, and remanded the case for further proceedings.

On remand, the District Court held evidentiary hearings and on October 14, 1972, signed and filed its Findings of Fact and Conclusions of Law and entered an order of compliance and writ of assistance.[1] In summary, the order of compliance required that the Navajo reduce their livestock to one-half of the carrying capacity of the joint use area as determined by a 1964 soil and range inventory of the Reservation. They had one year, until October 14, 1973, within which to complete this reduction. Within a year from the date of the order a new survey was to be made by the United States and further reductions of livestock, to one-half of the actual carrying capacity as evidenced by that survey, was to be accomplished within six months there-

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[1] ORDER OF COMPLIANCE. The plaintiff in the above-entitled action having filed his Petition for an Order and Writ of Assistance on March 13, 1970; and following an appeal and decision by the United States Court of Appeals for the Ninth Circuit and denial of a Petition for Writ of Certiorari by the Supreme Court of the United States on May 22, 1972, this Court heard and received evidence adduced by the parties hereto, and having adopted its Findings of Facts and Conclusions of Law herein on September 7, 1972, and having heard the arguments of the parties as to the proposed relief on September 30, 1972; and good cause appearing therefore,

IT IS ORDERED, ADJUDGED, AND DECREED:

That the Defendants be and they are hereby ordered and directed to grant and permit the joint use and possession of the surface, including all resources, in and to all of the Executive Order Reservation of December 16, 1882, lying outside of the boundaries of Land Management District 6 as defined on April 24, 1934, to the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Defendants shall forthwith commence reduction of livestock in the Joint-Use Area of the 1882 Executive Order Reservation, and within one (1) year from the date of this Order complete reduction of Navajo livestock to one-half (½) of the carrying capacity as determined by the Soil and Range Inventory of the 1882 Executive Order Reservation (exclusive of District 6) dated 1964.

2. Within one (1) year from the date of this Order a new Range Reconnaissance to determine the present carrying capacity of said area shall be completed by the United States, and immediately thereafter a further reduction of livestock to the actual carrying capacity shall be commenced by Defendants and be completed with six (6) months from such commencement.

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3. Commencing one (1) year from the date of this Order, livestock may be grazed upon the Joint-Use Area of the 1882 Executive Order Reservation, only after new permits therefor have been issued by the Bureau of Indian Affairs, and all prior existing permits shall be deemed cancelled as of that date. Thereafter, permits may be issued to either or both tribes or individual tribal members of said tribes as the respective tribal councils of said tribes shall direct.

4. Commencing one (1) year from the date of this Order, permits covering not more than one-half (½) of the carrying capacity shall be issued to the Navajo Tribe or members thereof, and permits covering not more than one-half (½) of such carrying capacity shall be issued to the Hopi Tribe or members thereof. Neither tribe, including the members thereof, shall at any one time hold permits which in total cover more than one-half (½) of the carrying capacity.

5. From the date of this Order all income from said Joint-Use Area to the Navajo and Hopi Tribes, including but not limited to income from mineral production and sales, leases, trader license fees, rights-of-way grants, and licenses shall be divided equally between said tribes. However, profits and gains from livestock use permitted as hereinbefore provided shall be the sole property of the permittee. Grazing fees may be assessed and collected in the future by either tribe from individual permittees of the assessing tribe and shall inure to the benefit of said tribe without accounting to the other tribe.

6. The tribes shall exchange copies of all existing leases, easements, contracts, or other documents together with written descriptions of all oral agreements, which relate to the Joint-Use Area or businesses or improvements located thereon.

7. No new construction shall be permitted on the Joint-Use Area without a permit issued jointly by the two tribes, except that the Hopi Tribe shall be permitted to construct that number of dwellings or other improvements equal to those Navajo dwellings and other improvements which are presently existing or are now under construction in the Joint-Use Area.

8. Within sixty (60) days from the date of this Order the United States of America shall present to this Court for its approval a plan to facilitate and implement this Order with relation to prevention of damage to, and misuse of, the rangeland as specified in Paragraphs 1 and 2, above.

9. Within ninety (90) days from the date of this Order the United States of America shall present to this Court for its approval a plan to facilitate and implement this Order, except with relation to prevention of damage to, and misuse of, the rangeland.

after. The order further provided that on October 14, 1973, all grazing permits were to be deemed cancelled and new permits were to be issued by the Bureau of Indian Affairs. Such cancellation was reaffirmed by the Court's order of January 25, 1974, but no new permits were issued as of the date of the contempt order, May 29, 1974. The new permits were to be allotted by the Tribes to their individual members and each Tribe was to be limited to permits up to one-half of the carrying capacity of the area. The order also restricted construction of new Navajo dwellings in the joint use area and required the United States to present to the Court within sixty days a plan to facilitate and implement the order as to the reduction of livestock by the Navajo and prevention of damages to and misuse of the range land in effecting such reduction.

On April 23, 1973, the Court approved and adopted the plans proposed by the Government for implementing the order of compliance and detailed the action to accomplish the reduction of Navajo livestock by October 14, 1973, and the restriction of Navajo construction on the joint use area.

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10. The plans required by this Order shall take effect upon approval of such plans by this Court.

11. Should Congressional legislation be enacted expressly conflicting with any of the specific provisions of this Order, this Court retains jurisdiction to make such changes and further orders as may be required to correlate this Order with any conflicting statutory provisions. All other provisions of this Order not in conflict with statutory provisions shall remain in full force and effect.

12. The Clerk of this Court shall issue a Writ of Assistance directing the Defendants herein to comply with the foregoing Order.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That matters and issues concerning accounting and restitution and as to liability of the United States in respect thereto, if any, to the extent this Court has jurisdiction, are expressly reserved for later consideration and hearing.

Dated this 14th day of October, 1972.

/s/James A. Walsh
JAMES A. WALSH
United States District Judge

The Navajo appealed from the order of compliance and portions of the Government plan. The United States did not appeal.

This Court reaffirmed the subject matter jurisdiction of the District Court and ruled that neither the order of compliance nor the adopted plan for the utilization of the joint use area constituted impermissible partition of the area, and that the order and the Government plan must be carried out, observing, "If, as appellant suggests, compliance will not be voluntarily forthcoming, then the district court possesses an ample reservoir of power to command respect for its orders." *Hamilton v. MacDonald*, 503 F.2d 1138, 1146 (9th Cir. Sept., 1974) (Hamilton II).

The Government moved the District Court on October 17, 1973, for an order extending the period of compliance from October 14, 1973, to October 14, 1974, and the Navajo sought an extension to October 14, 1975. The District Court, on January 25, 1974, denied the motion and reaffirmed its order that all pre-existing permits were cancelled as of October 14, 1973. This portion of the order was appealed by the Navajo in 74-1936, one of the three appeals presently before this court.

Following hearing on a Hopi motion to show cause, May 29, 1974, the defendants MacDonald and the Navajo Tribe were cited for contempt of Court for failure to reduce livestock and to control new construction as ordered. The Court further ordered the Navajo to commence reduction of livestock within five days from the date of the order, the reduction to "* * * be pursued without regard to the voluntary compliance of individual Indians." A fine of $250 per day was imposed on the defendants until the livestock of the Navajo within the joint use area "is reduced to 8,139 sheep units year round."

The Navajo appealed the contempt order which is presently before this Court as appeal No. 74-2215.

Congress, on December 22, 1974, enacted Public Law 93-531 (1974 Act), 25 U.S.C. 640d, et seq. This statute provides for the appointment of a mediator "to assist in the negotiations for settlement and partition of the relative rights and interests as determined by the decision in * * * Healing v. Jones * * *." It further provided that if no voluntary agreement were reached within 180 days the District Court was "authorized to make a final adjudication, including partition of the joint use area." Section 640d-18[2] of the law directed the Secretary of the Interior to forthwith commence reduction of livestock of the Navajo in the joint use area as provided in that Section.

Following this Congressional action and on July 11, 1975, this Court remanded the pending appeals 74-1936 and 74-2215 to the District Court for the purpose of that Court determining the effect of the 1974 Act on its prior orders.

District Judge Walsh, on October 14, 1975, held that the cases were not mooted by the 1974 Act and returned them to this Court with a memorandum in which he stated, among other things, that the Act was entirely in harmony with the Court's orders involved in the appeals and that nothing in the Act or in the legislative history discloses "any intention on the part of Congress to modify or alter the orders of this Court but on the contrary, a proposed amendment, which would have superseded the orders of the Court immediately failed of passage." The District Court, by a second order of the same date, October 14, 1975, determined that the Secretary's new five-year plan for livestock reduction was not authorized by Section 640d-18 and ruled that the Hopi motion "for an order directing the United States to proceed with reduction of livestock in the joint use area, *without regard to the voluntary compliance* of individual Indians is hereby granted and the United States is hereby directed to so proceed *immediately* and in accordance with the previous orders of this Court." [Emphasis added.]

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[2] §640d-18. Reduction of livestock within joint use area; institution of conservation practices; survey location of monuments and fencing of boundaries.

(a) Notwithstanding any provision of sections 640d to 640d-24 of this title, or any order of the District Court pursuant to section 640d-2 or 640d-3 of this title, the Secretary is authorized and directed to immediately commence reduction of the numbers of all the livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity of such lands, as determined by the usual range capacity standards as established by the Secretary after December 22, 1974. The Secretary is directed to institute such conservation practices and methods within such area as are necessary to restore the grazing potential of such area to the maximum extent feasible.

(b) The Secretary, upon the date of issuance of an order of the District Court pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title, shall provide for the survey location of monuments, and fencing of boundaries of any lands partitioned pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title.

Pub. L. 93-531, §19, Dec. 22, 1974, 88 Stat. 1721.

The Navajo appeal, 76-1006, from the order of the District Court returning the two appeals to this Court, supra, is now pending. The United States also appealed from the October order but stipulated to dismiss its appeal on March 19, 1976.

This Court, on February 18, 1976, denied the Hopi motion to dismiss the Navajo appeal, 76-1006, without prejudice.

APPEAL 76-1006

The Court concludes it has jurisdiction of this appeal under Section 1291, Title 28, U.S.C., and that appellant MacDonald has standing to contest the October 14, 1975, order. The appeal is the last of the three appeals filed but is here considered first since it involves the effect of the 1974 Act, Title 25, U.S.C. §§640d, et seq., on the issues involving reduction of livestock by the Navajo. The specific issue is whether, after the enactment of the 1974 Act, the District Court had jurisdiction to order livestock reduction as this Court had determined it did under the Act of 1958. *Hamilton V. Nakai,* (Hamilton I) 453 F.2d 152, 157. If Section 640d does not remove the jurisdiction of the District Court to order livestock reductions and to cancel grazing permits in the joint use area under the Act of 1958, then other issues in the appeals in 74-1936 and 74-2115 will be mooted.

The Navajo assert that the enactment of 640d, et seq., and particularly Section 640d-18 (Footnote 2) removed the jurisdiction of the District Court to grant relief with respect to the livestock reduction by specifically directing the Secretary of the Interior to commence reduction of livestock in the joint use area, and that the only jurisdiction left in the District Court in this regard is the review of the action under the Administrative Procedure Act, 5 U.S.C. § 706.

Two factors mitigate against this interpretation; first, the statute itself indicates that the District Court is to retain full jurisdiction over the supplemental proceedings in Healing v. Jones without any indication of intent to limit the possible remedies which the Court may employ to enforce the judgment in that case, and second, the legislative history of the Act does not evidence any intent of Congress to alter the holding of this Court in Hamilton I or II, supra.

It is clear that Congress contemplated the continued jurisdiction of the District Court in controlling the supplemental proceedings in the Healing case. Its continued reference to that case in the statute and the referral of settlement agreements or recommendations to the District Court for approval or modification discloses Congress' awareness of the continuing proceedings in the Healing case. The statute was enacted after the Hamilton cases, wherein this Court held that the order of compliance of October 14, 1972, was a proper exercise of jurisdiction by the District Court in enforcing the judgment in Healing v. Jones, yet nowhere in the statute does Congress express any intent to limit the relief which the District Court could grant in enforcing the ruling in Healing, that the Hopi and Navajo held the joint use area as joint tenants. Congress, being aware of the rulings of this Court in the Hamilton cases, surely would have made specific provisions to remove the power of the District Court to take the action it did in this matter if it had so intended.

The legislative history of the 1974 Act is enlightening as to the intent of Congress. The debate in the House discloses that Congress did not intend to supersede the existing Court orders but instead intended, by the section in question, to further those orders.

Representative Steiger of Arizona, speaking in committee in opposition to a proposed amendment which would have stayed the proceedings in Healing until the end of the settlement negotiation period provided for in Sections 3 and 4 of the Act, 25 U.S.C. §640d-2 and 3, stated that the amendment was not in the spirit in which the proceedings had been conducted and it would quash the rulings in Healing v. Jones, "it would quash the four court orders, including the contempt order which the Navajo are not in contempt of Court for not removing the livestock * * *."

Representative Meeds said, "I think we have absolutely no business going back and attempting to undo what the Court has done under these supplementary proceedings of Healing v. Jones. That would be the effect of the * * * amendment." The amendment was not adopted.

The House bill was not approved by the Senate although several provisions were adopted, including 640d-18. In the Senate report on the bill it was stated, "* * * we have seen the Court's order to reduce livestock will inevitably lead to some relocation of people. At present there is no statutory authority to compensate people who must move because of the loss or to follow their livestock. This is a gap which we believe must be filled." Two million dollars was appropriated for the funding of the Secretary's livestock reduction plan in December, 1975, but the above quoted portion of the Senate report suggests that the intent was not to override the Court's orders. In the Senate debate on the bill which became law, three Senators, Goldwater, Fannin and Scott, who supported the bill, expressed the intent that the primary purpose of the legislation was to provide the Court with authority to partition, which authority the Court had determined it lacked in the Healing case.

Senator Goldwater, in the debate on the final bill, referred on two occasions to the four Court decisions that the Navajo had defied, stating that they were presently paying $250 a day under order of the Court "because they will not obey the Court." He obviously did not believe the bill superseded the Court's orders.

The final bill, as approved by the Senate and House, evidences the fact that Congress did not intend to supersede the existing Court orders but instead, to further them.

The learned District Judge, in his order of October 14, 1975, returning the appeals to this Court, ruled that the 1974 Act was entirely in harmony with the Court's orders involved in the appeals. In a separate order of that date the District Court stated, "2. That Section 19, of the Act * * * directed the Secretary * * * to begin to do immediately what the orders of the Court required."

We agree. The order appealed from is AFFIRMED.

APPEAL No. 74-1936

This Navajo appeal is from the order of the District Court of January 25, 1974, denying motions of the Navajo and the United States to extend the time for compliance with the October 14, 1972, order from October 14, 1973, to October 14, 1975, and to October 14, 1974, respectively. Four issues are raised in this appeal, (1) the Interior Department regulations were not followed in cancelling the permits, (2) Notice of hearing and a hearing were required by statute and due process as to individual Navajo, (3) The District Court lacked jurisdiction to modify its order of compliance currently on appeal, and (4) Is the order appealable?

This Court's affirmance of the District Court's order in appeal No. 76-1006, supra, and its ruling that Congress, in enacting Title 25, U.S.C. §640d, did not intend to remove the jurisdiction and power of the District Court to grant appropriate relief to enforce the judgment in the Healing case, leave only the due process issue since any question as to the usurpation of or exhaustion of agency authority as to cancellation or issuing of permits should have been raised by the Navajo in their appeal from the 1972 order in Hamilton II. However, approaching this appeal on the merits we find that this Court determined in Hamilton I that the District Court has wide discretion in formulating orders to enforce the decree in Healing II and had power under the 1958 Act to reduce livestock in the joint use area, stating, "[The District Judge] can taylor the relief to be afforded to the facts that confront him." In appeal No. 76-1006, we have now held that Section 640d does not affect that power. Consequently, the doctrine of primary jurisdiction of an agency does not apply. It is also to be remembered that the District Court adopted the government's livestock reduction plan by its order of April 23, 1973, which order was held to be valid in Hamilton II.

The Navajo urge that the individual members of the Tribe are entitled to notice of the cancellation of their permits and a hearing on the issue by virtue of due process. They contend that although the Tribe is representing the individual Indians pursuant to the 1958 Act, notice must be given to all members of a class. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974), a classic class action case. A typical class action is not here involved. It appears the Navajo claim to the joint use area has been a Tribal claim and the claim was adjusted by the Court as a Tribal claim, not as a claim of individual members. The Navajo points to the requirement of the Administrative Procedure Act and agency regulations as to notice and hearing. Those procedures are not applicable because Congress, by the provisions of the 1958 Act, vested in the District Court of Arizona the authority to determine the rights and interests in the joint use area. Therefore, the Court, not the agency, has jurisdiction.

The testimony of Tribal Chief MacDonald and another Navajo official evidenced that they had personally informed individual Navajos in the joint use area, in official meetings, of the order re cancellation of their permits. The claim that the due process clause requires a hearing for the individual Navajo permittee where the Tribe was a party to the suit is not convincing, since the wording of the 1958 Act indicates that Congress intended that the Tribe represent the interests of all members in the dispute and the Tribe has so represented the individual members and their interests in the litigation. Congress apparently recognized that it was impractical to bring before the Court all interested individual members of the Navajo Tribe and therefore designated the Chairman of the Tribal Council to represent their interests. There is no substantial basis for the claim that Congressional action has the effect of depriving the Navajo of their property without due process of law. *Winton v. Amos*, 255 U.S. 373, 391-392 (1921).

The order of the District Court, January 25, 1974, denying the motions to enlarge the time to comply with the October 14, 1972, order of compliance, including the cancellation of all existing grazing permits, is AFFIRMED.

APPEAL No. 74-2215

The Navajo appeal the May 29, 1974, order of the District Court directing immediate reduction of livestock and citing the Navajo for contempt for failure to reduce livestock and for their new construction in the joint use area in violation of the orders of October 14, 1972, and April 23, 1973.

It is urged as grounds for this appeal, (1) they were not able to comply with the order, (2) the prior orders of the District Court lacked specificity, (3) no clear and convincing evidence of failure to comply with the order, and (4) the contempt provisions of the order constituted a modification of a prior order then on appeal.

The general principle that one is not in contempt for noncompliance with an order he is not capable of performing is not in controversy. The issue here is whether the defendants MacDonald and the Navajo Tribe took all of the reasonable steps within their power to insure that the Tribe, and the members it represents, complied with the order of the Court. The authorities cited by the appellee do not deal with Indian Tribes but lend enlightenment by analogy to the argument that MacDonald and the Tribe may be held in contempt if they have not taken all reasonable steps within their power to insure compliance, by the individual members of the Tribe, with the order for reduction of livestock and against new construction in the joint use area.

Both sides refer to the testimony before the District Court. The appellants outline the efforts of the Tribe and Chairman MacDonald have made to comply with the order, including (1) the encouragement of additional livestock sales, (2) the development of a detailed proposal for the sale and removal of 29,200 sheep units, setting forth the procedures by which the Navajo Tribal Range Livestock Department would assist the United States in conducting sales, and (3) informing individual Navajo of the requirement of the Court order to reduce their livestock and refrain from new construction in the Area. Chairman MacDonald testified with respect to the termination of grazing permits, that Section 204 of the Navajo Code provided, with regard to grazing, "That any Indian who shall allow his stock to graze on tribal lands without a grazing permit shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to hard labor for a period not to exceed three months or shall be fined not to exceed $100, or both. In lieu of cash, this fine, if levied, may be collected in livestock." He said the provision of this Code section had not been enforced by prosecutions because it was his understanding that jurisdiction over grazing rights had been vested in the Department of Interior, not the

Navajo Tribe, since 1969. He, however, was cognizant of the Court's order cancelling all grazing permits as of October 14, 1973, and the denial of the request for extending the time for complying with that order, and stated, "We went out and informed the people what the order of October 14, 1973, is all about and we had asked them to comply * * *." The Tribe authorities and the Navajo-Hopi Land Dispute Commission of the Navajo Tribe were instructed "to move forward * * * within our power to effect the Court order." The testimony of Chairman MacDonald disclosed that the Tribe did have jurisdiction over the Navajo living in the joint use area and the Tribal courts, though sitting outside the area, had jurisdiction over the members in the area. It is to be noted that Section 1251 of the Navajo Code reads: "A Police Department is established in the Executive Branch of the Navajo Tribal Government." Title Two, Section 904 states, in defining the duties of the Tribal Chairman under paragraph (A) of Section 903: "He shall have ultimate responsibility for the power and effective operation of Tribal Executive Divisions and Departments." Section 283 of Title Two provides that "Responsibility for directing and supervising the personnel of executive or business staff of the Tribe shall be in the Chairman."

It was stated by Chairman MacDonald that he did not believe the grazing permits were to be cancelled until some official notice was received notifying everyone that the permits were cancelled. In view of the advice given to the members of the Tribe in the joint use area of the Court's order cancelling the grazing permits, the instructions to comply with that order and the alleged efforts to comply, ineffective and meager as they were, the position as to the expectation of or need for an official notice is not convincing. The defendants made no effort to impose sanctions nor, as pointed out by the Court, did they pass any regulations which they could have enforced in an effort to comply with the Court's order.

Samuel Pete, the Director of the Navajo-Hopi Land Dispute Commission, formed in August, 1972, and which is now composed of nine members of the Navajo Tribe, testified that they had been notifying the Navajo in the joint use area since the Court order was issued, "telling them explicitly what is contained in this particular order."

He read the Court order dated October 14, 1972, cancelling the grazing permits as of October 14, 1973, when he took office on January 10, 1973, "and it was reaffirmed on January 25th (1974) order * * *."

The members of the Tribe, through Chapter meetings, were advised of the appeal from the Court's January 25, 1974, order. In this regard, Mr. Pete testified, "We have told them that we have taken appeal from the January 25, 1974, Court order and that this is pending. And that we have to comply with the Court order because this is law." He said he personally felt, as stated in the appeal, No. 74-1936, supra, that "there were existing procedures which should be followed in revoking our grazing permits, * * * but it wasn't," however, he "didn't say the entire Navajo Tribe took that position."

The efforts on the part of the Navajo to comply with the Court's orders, as related by Mr. Benjamin, Project Officer for the joint use area administrative office in Flagstaff, constituted a proposal by the Navajo for money to hold public sales but this proposal contained no dates and no schedule for stock reduction. In this connection, Benjamin, on February 22nd, requested the Navajo to furnish, by March 15, 1974, its proposed schedule as to the times for reduction of livestock in the joint use area. The Navajo failed to furnish such schedule but on April 10, 1974, delivered a proposal in the form of a letter dated March 21, 1974, requesting $92,600 from the United States to enable the Navajo Tribal Range Livestock Department to assist the Federal Government in conducting livestock sales and fixing corrals in the joint use area. The letter contained no dates for sales or reduction of livestock. Money was also sought for the removal from the joint use area of 29,200 sheep units, the said sheep units to consist of 1500 horses, 1800 cows, 50 mules, 50 donkeys and 14,000 sheep. A horse was rated as 5 sheep units and a cow as 4. The Navajo had estimated that they had approximately 120,000 sheep units in the joint use area in 1972 and claimed substantial losses in livestock during the winter of 1972-73.

Some livestock sales were held both in and outside the joint use area but most of the cattle sold were the yearly increase. It is not clear that these sales were not regular annual livestock sales normally held by stock breeders nor what, if any, sales involved stock which was not normal yearly increases.

In its Findings of Fact, the District Court, on May 29, 1974, found that the new range reconnaissance report (August, 1973), as directed to be made in paragraph 2 of the Order of Complicance, determined the actual carrying capacity of the joint use area to be 16,278 sheep units. The reduction of livestock was small when compared to the reduction to 8,139 sheep units by the Navajo as required by the Court's orders to meet the carrying capacity of the Area.

The Court found further that in spite of vague claims, livestock sales, investigation of alternative grazing land for Navajo livestock, and removal of unbranded livestock from the Area, "* * * the facts are that the Area has been for years, and now is, severely overgrazed by Navajo livestock and such livestock presently grazed in the Area greatly exceeds 8139 sheep units."

Although the record is not clear as to the number of violations of the prohibition against new construction in the joint use area, it does support the Court's finding that "twenty or more structures have been erected in the Joint Use Area in violation of the Order."

The Court's Findings of Fact signed May 29, 1974, are supported by substantial evidence and fully justify the Court's Conclusions of Law, which state:

> "1. Defendant MacDonald appears herein pursuant to authority granted by, and by virtue of, the Act of July 22, 1958, 72 Stat. 402, as Chairman of the Navajo Tribal Council for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882.
>
> 2. Neither the defendant MacDonald nor the Navajo Tribe has taken the reasonable measures within their power and available to them to bring to an end the unlawful grazing, monopolizing, and damaging of the range lands within the Joint Use Area by members of the Navajo Tribe.
>
> 3. Neither defendant MacDonald nor the Navajo Tribe has endeavored in good faith to comply with the Court's directions in Paragraphs 1 and 2 of the Order of Compliance looking to the reduction of Navajo livestock in the Joint Use Area.
>
> 4. Neither defendant MacDonald nor the Navajo Tribe has taken the reasonable measures within their power and available to them to bring to an end and eliminate construction of improvements by members of the Navajo Tribe within the Joint Use Area which are in violation of Paragraph 7 of the Order of Compliance.
>
> 5. The reasons offered by defendant MacDonald and the Navajo Tribe for non-compliance with the Court's orders for reduction of livestock and for control of new construction upon the Joint Use Area do not constitute good cause or reasonable justification for such non-compliance.
>
> 6. Jurisdictional sanctions are necessary in these proceedings to coerce defendant MacDonald and the Navajo Tribe into complying with the Court's orders.

> 7. Plantiff is entitled to have this court exercise its equitable power to award him attorneys fees and costs in connection with these proceedings and any further proceedings necessarily taken hereafter herein to enforce the orders of this Court."

During the contempt hearings the District Court observed it believed that since the land in the joint use area was Tribal land that Chairman MacDonald and the Tribal Council could have passed regulations which would have had the force of law and subjected individual Indians to sanctions for failure to comply.

The appellants, in support of their position, repeated their argument as to the inherent difficulties in complying with the orders but those arguments made in prior opposition to compliance and, as the Court said in Hamilton II, "there was no occasion for the District Court to 're-balance' the hardship imposed on individual members of the Navajo Tribe * * *. That balance was struck in Healing II and is now the law of the case." 503 F.2d at 1145, supra.

We conclude that the District Court correctly took the position that the May 29, 1974, contempt order was in the nature of an enforcement order of its previous order of compliance which had not been stayed on appeal. To hold otherwise would deny the District Court the power to enforce its unstayed orders while they were on appeal.

The appellants' position that there was reason to believe voluntary compliance with the Court's order was contemplated is of little consequence by reason of the statement by the District Court during the hearing on August 25, 1973: "I am pointing out that the Court's Order of Compliance very definitely indicates that if it can't be done voluntarily that it is going to be done involuntarily."

This Court's perspective of these consolidated appeals, having in mind the multiple and repeated orders of the District Court to effect compliance with Healing II, as instructed by this Court, and what may be described as little real conscientious effort on the part of the appellants to comply with those orders, leads the Court to the conclusion that the appellants have not taken all the reasonable steps within their power to insure compliance with the orders by all concerned including the individual members of the Tribe.

The lapse of years since this Court determined the District Court had the authority to implement the judgment in Healing II and the great efforts by the District Court to comply as disclosed by the history of the various proceedings and orders, indicate conscious foot dragging on the part of the appellants. Their meager efforts to comply with the orders of the District Court create the impression described by appellees' counsel as merely the tuning up of a band that never intended to play. This conduct is not in keeping with the illustrious heritage and traditions of this great American Indian Tribe.

The contempt order of the District Court is AFFIRMED.

Recapitulating, each of the orders of the District Court contested in appeals Nos. 74-1936, 74-2215 and 76-1006, are AFFIRMED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CLARENCE HAMILTON, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882,

Plaintiff,

vs.

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882; ELLIOTT L. RICHARDSON, Attorney General of the United States, on behalf of the United States,

Defendants.

NO. CIV-579-PCT-JAW

ORDER

Defendant, Elliott L. Richardson, Attorney General of the United States, on behalf of the United States having moved the Court to amend its Order of Compliance entered herein on October 14, 1972, to enlarge the time for compliance with paragraphs 1, 2, 3 and 4 thereof to and including October 14, 1974, and Defendant Peter MacDonald, having moved the Court to amend said Order of Compliance by enlarging the time for compliance with paragraphs 1, 2, 3 and 4 thereof to and including October 14, 1975, and the matter having come on regularly for hearing before the Court on December 1, 1973, and evidence having been adduced, the Court being fully advised, and Defendants having failed to show good cause therefor, it is

ORDERED that said motions of Defendants, Elliott L. Richardson and Peter MacDonald, be, and the same are hereby denied, and it is

FURTHER ORDERED that questions propounded by the parties hereto concerning said order of Compliance be and the same are hereby resolved and determined as follows:

1. Paragraph 3 of said Order of Compliance cancelling all existing livestock grazing permits covering lands within the Joint Use Area of the 1882 Executive Order Reservation as of the 14th day of October, 1973, and such cancellation is hereby reaffirmed.

2. The Secretary of the Interior does have the power to exercise the necessary rights-of-way without the consent of either tribe to carry out the fencing program contemplated by the United States as described in these proceedings, provided that the fencing of Grazing District 6 and the exterior boundaries of the 1882 Executive Order Reservation be carried out at the same time.

3. Plaintiff is granted leave, if he so desires, to amend his contempt petition without indication or commitment by the Court as to the effect of such amendment.

DATED this 25 day of January, 1974.

JAMES A. WALSH
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882,

Plaintiff,

vs.

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882; WILLIAM H. SAXBE, Attorney General of the United States, on behalf of the United States,

Defendants.

No. Civil 579 Pct.
(JAW)
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
JUDGMENT AND ORDER ON CITATION FOR CONTEMPT

An Order to Show Cause dated July 19, 1973, having been duly issued by this Court, directed to, and served upon defendant Peter MacDonald on the 1st day of August, 1973, returnable to this Court on the 25th day of August, 1973, at 9:30 a.m. requiring Peter MacDonald to show cause why he should not be punished for contempt of Court because of his alleged failure to obey, comply with and carry out the provisions of the Order of Compliance entered herein on the 14th day of October, 1972, and the Order to Show Cause having come on for hearing on August 25, 1973, and the Court having heard testimony from witnesses and having reviewed documentary evidence at a hearing on said 25th day of August, 1973, and at further hearings thereafter, and the Order to Show Cause having been amended on March 30, 1974, pursuant to leave of this Court granted on December 1, 1973, to cite Peter MacDonald and the Navajo Tribe which he represents for their alleged failure to obey said Order of Compliance, and having heard argument by both parties, and being fully advised, the Court makes the following Findings of Fact and Conclusions of Law, viz:

FINDINGS OF FACT

1. On October 14, 1972, this Court entered herein an Order of Compliance (hereinafter "Order of Compliance"), a copy of which is attached hereto as "Exhibit A" and by reference made a part hereof.

2. On October 31, 1972, this Court issued a Writ of Assistance (File Document 137) directing the United States Marshal for the District of Arizona to serve the same upon the defendant MacDonald, together with a copy of the Order of Compliance. The United States Marshal served the Writ of Assistance and a copy of the Order of Compliance upon defendant MacDonald on December 15, 1972.

3. Pursuant to the provisions of Paragraph 8 of the Order of Compliance, on December 14, 1972, the United States submitted and filed herein (File Document 139) a plan to facilitate and implement the Order of Compliance with relation to prevention of damage to and misuse of rangeland in the Joint Use Area. On April 23, 1973, this Court entered its Order (File Document 151) approving and adopting the plan of the United States. However, the plan failed to come to fruition and nothing has been accomplished by any of the defendants by way of reducing the livestock in the Joint Use Area to the carrying capacity of 16,278 sheep units year long, which was established in August, 1973 (Finding No. 6, infra).

4. On October 17, 1973, defendant Attorney General of the United States, on behalf of the United States, moved the Court to amend the Order of Compliance to enlarge the time for compliance with Paragraphs 1 through 4 of the Order, to and including October 14, 1974; and on November 21, 1973, defendant MacDonald moved the Court to amend the Order of Compliance by enlarging the time for compliance with Paragraphs 1 through 4 of the Order to and including October 14, 1975. Both motions were denied by written Order entered herein on January 25, 1974.

5. The livestock carrying capacity of the Joint Use Area as determined by the soil and range inventory referred to in Paragraph 1 of the Order of Compliance was 22,036 sheep units year long.

6. On or about August 16, 1973, the United States completed and filed herein a new range reconnaissance report, as directed in Paragraph 2 of the Order of Compliance, which determined the actual carrying capacity of the Joint Use Area, as of the date of the report, to be 16,278 sheep units year long.

7. Paragraph 3 of the Order of Compliance cancelled all existing livestock grazing permits covering lands within the Joint Use Area as of October 14, 1973, and such cancellation was reaffirmed by this Court on January 25, 1974.

8. No new permits permitting grazing upon the Joint Use Area have been issued by the Bureau of Indian Affairs since October 14, 1973.

9. Notwithstanding the Court's Order of Compliance entered on October 14, 1972, neither defendant MacDonald nor the Navajo Indian Tribe made efforts or took steps in good faith to accomplish the reduction of Navajo livestock in the Joint Use Area within one year to one-half of the carrying capacity determined by the soil and range inventory of the 1882 Executive Order reservation (exclusive of

District 6) dated in 1964; nor did either defendant MacDonald or the Navajo Indian Tribe, after completion and filing with the Court in August, 1973, of the new range reconnaissance determining the present carrying capacity of the Area, make efforts or take steps in good faith to accomplish the reduction of Navajo livestock within six months to one-half of the carrying capacity established by such new range reconnaissance. (RT 3/3/73, pp. 58, L 24-61, L 23; RT 9/14/73, pp. 59, L 9-73, L 19; RT 4/20/74, pp. 124, L 1-125, L 8, pp. 134, L 25-136, L 3).

10. In 1972, the Navajo Indian Tribe estimated that there were approximately 120,000 sheep units on the range in the Joint Use Area. (RT 4/20/74, pp. 136, L 7-137, L 18). Counsel for defendant MacDonald and the Navajo Indian Tribe have admitted that the Area is overgrazed. (RT 9/14/73, p. 66, L 15-18). While defendant MacDonald insists herein that plaintiff has not established that the Navajo are grazing in excess of 8139 sheep units (one-half the actual carrying capacity per the 1973 Range Reconnaissance Report, Finding 6, supra,) within the Joint Use Area, a proposal submitted by defendant MacDonald to the Bureau of Indian Affairs on April 10, 1974, requested funds with which to remove 29,200 sheep units from the Joint Use Area. (RT 4/20/74, pp. 127, L 17-128, L 19). In spite of vague claims by defendant MacDonald and the Navajo Indian Tribe as to: (1) livestock sales and prospective livestock sales in the Joint Use Area; (2) proposed establishment of a livestock enterprise for the removal of livestock from the Area; (3) removal of unbranded livestock from the Area; and (4) investigation of alternative grazing lands for the Navajo livestock, the facts are that the Area has been for years, and now is, severely overgrazed by Navajo livestock and such livestock presently grazed in the Area greatly exceeds 8139 sheep units.

11. The failure to reduce livestock to the carrying capacity in the Joint Use Area before the commencement of new growth in 1974, which is estimated as on or about May 1, will result in further injury to and loss of soils. (RT 4/20/74, p. 123). On February 22, 1974, William Benjamin, Project Officer for the Joint Use Administration Office, Flagstaff, Arizona, requested the Navajo Tribe to furnish by March 15, 1974, its proposed schedule as to time for reduction of livestock in the Joint Use Area. (Pl. Ex. 13; RT 4/20/74, pp. 121, 122). The Navajo Tribe failed to furnish any schedule for the reduction of livestock (RT 4/20/74, p. 122), but on April 10, 1974, delivered to the Joint Use Administration Office a letter dated March 21, 1974, requesting $92,600 from the United States Government on a contractual basis, so that the "Navajo Tribal Range and Livestock Department can assist the Federal Government to conduct a series of voluntary livestock sales in or near the 1882 Executive Order Reservation.". (RT 4/20/74, pp. 39, 40, 124; Def. Ex. A, 4/20/74). On December 24, 1973, plaintiff furnished to the Project Officer of the Joint Use Administration Office a written proposal of the Hopi Tribe for removal of livestock from the Joint Use Area. (Pl. Ex. 13, p. 2, 4/20/74).

12. Although the Order of Compliance cancelled all existing grazing permits on the Joint Use Area as of October 14, 1973, and although this cancellation was affirmed by the Court's order of January 25, 1974, (File Document 179), and although no new grazing permits have been issued pursuant to the provisions of the Order of Compliance, defendant MacDonald and the Navajo Tribe have made no effort whatever to persuade, direct, or coerce any Navajo livestock owner who has been grazing stock in the Joint Use Area without a permit to desist from such conduct. In this regard, defendant MacDonald and the Navajo Tribe have taken the position that only the Superintendents on the Navajo Indian Reservation can cancel such permits. (RT 4/20/74, pp. 26, L 8-29, L 1).

13. Paragraph 7 of the Order of Compliance provides that:

> "No new construction shall be permitted on the Joint-Use Area without a permit issued jointly by the two tribes, except that the Hopi Tribe shall be permitted to construct that number of dwellings or other improvements equal to those Navajo dwellings and other improvements which are presently existing or are now under construction in the Joint-Use Area."

Notwithstanding the provisions of Paragraph 7, it appears that since October 14, 1972, twenty or more structures have been erected in the Joint Use Area in violation of the Order.

14. In 1973, there were brought to the attention of the Comptroller General of the United States 131 cases of claimed construction by Navajos in the Joint Use Area after October 14, 1972, which might be new construction in violation of Paragraph 7 of the Order of Compliance. Representatives of the Comptroller General examined 37 of these cases prior to November 26, 1973, and reported that nine of the cases were new construction, i.e., construction that did not replace a burned or dilapidated building or construction that added to existing buildings. The report stated, further, that Federal funds had been used in four of the nine cases. (Pl. Ex. 1, 4/20/74).

15. While the defendant MacDonald and the Navajo Tribe have brought the provisions of Paragraph 7 of the Order of Compliance to the attention of Navajos living in the Joint Use Area and have advised such residents that any new construction *may* violate Paragraph 7, they have done nothing to prevent construction in violation of the Order but have contended themselves with notifying the Hopi Tribe that if the Hopis will bring any claimed violation of Paragraph 7 to the attention of Samuel Pete, of the Navajo-Hopi Land Dispute Commission, an investigation will be made.

16. A "ceremonial structure" reported by the Comptroller General as a violation of Paragraph 7 (Pl. Ex. 1, p. 17, 4/20/74) was explained by the owner to the representatives of the Comptroller General as being a temporary structure for use during a nine-day ceremonial to begin November 13, 1973, and to be dismantled thereafter. At the hearing before this Court on April 20, 1974, Samuel Pete testified that the ceremonial structure had been removed prior to April 11, 1974, when Pete drove to its site. (RT 4/20/74, p. 35). In fact, however, it appears that the structure was still standing on April 16, 1974, when Nathan Begay, an employee of the Bureau of Indian Affairs, visited the site and photographed the structure. (RT 4/20/74, p. 44, Pl. Ex. 2). It appears, also, that there were ten additional instances of Navajo construction in the Joint Use Area which were commenced subsequent to November 26, 1973. (RT 4/20/74, pp. 44-95; Pl. Exs. 3 through 12).

CONCLUSIONS OF LAW

1. Defendant MacDonald appears herein pursuant to authority granted by, and by virtue of, the Act of July 22, 1958, 72 Stat. 402, as Chairman of the Navajo Tribal Council for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882.

2. Neither the defendant MacDonald nor the Navajo Tribe has taken the reasonable measures within their power and available to them to bring to an end the unlawful grazing, monopolizing, and damaging of the range lands within the Joint Use Area by members of the Navajo Tribe.

3. Neither defendant MacDonald nor the Navajo Tribe has endeavored in good faith to comply with the Court's directions in Paragraphs 1 and 2 of the Order of Compliance looking to the reduction of Navajo livestock in the Joint Use Area.

4. Neither defendant MacDonald nor the Navajo Tribe has taken the reasonable measures within their power and available to them to bring to an end and eliminate con-

struction of improvements by members of the Navajo Tribe within the Joint Use Area which are in Violation of Paragraph 7 of the Order of Compliance.

5. The reasons offered by defendant MacDonald and the Navajo Tribe for non-compliance with the Court's orders for reduction of livestock and for control of new construction upon the Joint Use Area do not constitute good cause or reasonable justification for such non-compliance.

6. Jurisdictional sanctions are necessary in these proceedings to coerce defendant MacDonald and the Navajo Tribe into complying with the Court's orders.

7. Plantiff is entitled to have this court exercise its equitable power to award him attorneys fees and costs in connection with these proceedings and any further proceedings necessarily taken hereafter herein to enforce the orders of this Court.

JUDGMENT AND ORDER

The foregoing Findings of Fact and Conclusions of Law have been made and entered herein by the Court and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that defendant Peter MacDonald and the Navajo Indian Tribe are guilty of contempt of this Court in failing to reduce the livestock upon the Joint Use Area as ordered and directed by the Court and in failing to control new construction within the Joint Use Area as ordered and directed by the Court.

IT IS ORDERED AND ADJUDGED, FURTHER, that defendant MacDonald and the Navajo Indian Tribe commence reduction of livestock upon the Joint Use Area, as ordered and directed in the Order of Compliance, within five (5) days from date hereof. The reduction shall be pursued without regard to the voluntary compliance of individual Indians. All parties to this action shall cooperate fully with each other and with the United States to accomplish the reduction with due diligence.

IT IS ORDERED AND ADJUDGED, FURTHER, that defendants MacDonald and the Navajo Indian Tribe pay a fine in the sum of Two Hundred Fifty Dollars ($250.00) per day, commencing on the date of this order and judgment and continuing until the livestock of the Navajo Indians within the Joint Use Area is reduced to 8139 sheep units year round, such fine being imposed to coerce defendant MacDonald and the Navajo Indian Tribe into compliance with the Court's orders and to be paid to the Clerk of this Court.

IT IS ORDERED AND ADJUDGED, FURTHER, that defendant MacDonald and the Navajo Indian Tribe shall within ten (10) days from date hereof submit to this Court the names and mailing addresses of all persons claiming ownership of the improvements pictured in plaintiff exhibits Nos. 2 through 12, inclusive, in evidence in this case on April 20, 1974, together with the names and addresses of all persons claiming ownership to the improvements described on pages 11, 12, 13, 14, 15, 16, 18, and 19, Pl. Ex. 1, in evidence on April 20, 1974; and that the United States submit to this Court within sixty (60) days from date hereof a complete inventory of all improvements within the Joint Use Area, by clear legible aerial photographs or otherwise.

IT IS ORDERED AND ADJUDGED, FURTHER, that plaintiff have and recover of and from defendant MacDonald and the Navajo Indian Tribe costs and reasonable attorneys' fees incurred herein, such fees and costs to be hereafter fixed by the Court following a hearing of the parties held for that purpose.

DATED: May 29, 1974.

JAMES A. WALSH
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Abbott Sekaquaptewa, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in the executive order dated December 16, 1882,

Plaintiff,

vs.

Peter MacDonald, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882; **Edward H. Levi**, Attorney General of the United States, on behalf of the United States,

Defendants.

ORDER
DIRECTING
THE
UNITED STATES
TO PROCEED
WITH
REDUCTION
OF LIVESTOCK

Civil No. 579 (JAW)

The Plaintiff, in the above-entitled action, having moved the Court *inter alia*, for an Order directing the United States to proceed with the reduction of livestock in the Hopi-Navajo Joint Use Area, without regard to the voluntary compliance of individual Indians, and the Motion having come on for hearing on the 16th day of August, 1975, and the Court having heard the arguments of counsel, and having considered the documents and briefs submitted by the Plaintiff and the United States; and the Court having heretofore, on the 14th day of October, 1972, directed all of the Defendants to reduce the livestock in the Joint Use Area to its carrying capacity, as the capacity should thereafter be determined by a range reconnaissance, and the Court having further directed that the United States should not, in the future, issue permits in excess of the determined carrying capacity, issuing one-half of the permits to each of the Tribes having interest in the Joint Use Area, and being fully advised, the Court concludes:

1. That the Secretary of the Interior has determined the carrying capacity of the Joint Use Area to be 16,000 sheep units (Gov. Ex. "2", unnumbered page. following page 9), although the total sheep units in the Joint Use Area on the five year plan show it is established at 120,200 sheep units.

2. That Section 19, of the Act of December 22, 1974, 88 Stat. 1712, directed the Secretary of the Interior to begin to do immediately what the Orders of the Court required, namely, the reduction of the livestock in the Joint Use Area, and when, after the passage of said act, the Secretary determined the livestock carrying capacity in the Joint Use Area, to complete the reduction.

3. That in the light of the provisions of Section 19 of said Act, there is no basis for the Secretary's position that said Act authorizes him to take five years in which to accomplish the reduction.

In view of the foregoing conclusions, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for an Order Directing the United States to Proceed with Reduction of Livestock in the Joint Use Area, without regard to the voluntary compliance of individual Indians is hereby granted, and the United States is hereby directed to so proceed immediately and in accordance with the previous Order of this Court.

DATED this 14 day of October, 1975.

JAMES A. WALSH
DISTRICT JUDGE

UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Public Law 85-547

AN ACT

To determine the rights and interests of the Navajo Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 16, 1882, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navajo Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navajo or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

SEC. 2. Lands, if any, in which the Navajo Indian Tribe or individual Navajo Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navajo Indian Reservation. Lands, if any, in which the

Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navajo and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Approved July 22, 1958.

Public Law 93-531
93rd Congress, H. R. 10337
December 22, 1974

AN ACT

To provide for final settlement of the conflicting rights and interests of the Hopi and Navajo Tribes to and in lands lying within the joint use area of the reservation established by the Executive order of December 16, 1882, and lands lying within the reservation created by the Act of June 14, 1934, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, (a) within thirty days after enactment of this Act, the Director of the Federal Mediation and Conciliation Service shall appoint a Mediator (hereinafter referred to as the "Mediator") who shall assist in the negotiations for the settlement and partition of the relative rights and interests, as determined by the decision in the case of Healing v. Jones (210 F. Supp. 125, D. Ariz., 1962, aff'd 363 U.S. 758, 1963) (hereinafter referred to as the "Healing case"), of the Hopi and Navajo Tribes (hereinafter referred to as the "tribes") to and in lands within the reservation established by the Executive order of December 16, 1882, except land management district no. 6 (such lands hereinafter referred to as the "joint use area"). The Mediator shall not have any interest, direct or indirect, in the settlement of the interests and rights set out in this subsection. The duties of the Mediator shall cease upon the entering of a full agreement into the records of the supplemental proceedings pursuant to section 3 or the submission of a report to the District Court after a default in negotiations or a partial agreement pursuant to section 4.

(b) The proceedings in which the Mediator shall be acting under the provisions of this Act shall be the supplemental proceedings in the Healing case now pending in the United States District Court for the District of Arizona (hereinafter referred to as "the District Court").

(c)(1) The Mediator is authorized to request from any department, agency, or independent instrumentality of the Federal Government any information, personnel, service, or materials he deems necessary to carry out his responsibilities under the provisions of this Act. Each such department, agency, or instrumentality is authorized to cooperate with the Mediator and to comply with such requests to the extent permitted by law, on a reimbursable or nonreimbursable basis.

(2) To facilitate the expeditions and orderly compilation and development of factual information relevant to the negotiating process, the President shall, within fifteen days of enactment of this Act, establish an interagency committee chaired by the Secretary of the Interior (hereinafter referred to as the "Secretary") to develop relevant information and to respond to the requests of the Mediator.

(d) The Secretary shall appoint a full-time representative as his liaison with the Mediator to facilitate the provision of information and assistance requested by the Mediator from the Department of the Interior.

(e) The Mediator may retain the services of such staff assistants and consultants as he shall deem necessary, subject to the approval of the Director of the Federal Mediation and Conciliation Service.

Sec. 2. (a) Within thirty days after enactment of this Act, the Secretary shall communicate in writing with the tribal councils of the tribes directing the appointment of a negotiating team representing each tribe. Each negotiating team shall be composed of not more than five members to be certified by appropriate resolution of the respective tribal council. Each tribal council shall promptly fill any vacancies which may occur on its negotiating team. Notwithstanding any other provision of law, each negotiating team, when appointed and certified, shall have full authority to bind its tribe with respect to any other matter concerning the joint use area within the scope of this Act.

(b) In the event either or both of the tribal councils fail to select and certify a negotiating team within thirty days after the Secretary communicates with the tribal council under subsection (a) of this section or to select and certify a replacement member within thirty days of the occurrence of a vacancy, the provisions of subsection (a) of section 4 shall become effective.

(c) Within fifteen days after formal certification of both negotiating teams to the Mediator, the Mediator shall schedule the first negotiating session at such time and place as he deems appropriate. The negotiating sessions, which shall be chaired by the Mediator, shall be held at such times and places as the Mediator deems appropriate. At such sessions, the Mediator may, if he deems it appropriate, put forward his own suggestions for procedure, the agenda, and the resolution of the issues in controversy.

(d) In the event either negotiating team fails to attend two consecutive sessions or, in the opinion of the Mediator, either negotiating team fails to bargain in good faith or an impasse is reached, the provisions of subsection (a) of section 4 shall become effective.

(e) In the event of a disagreement within a negotiating team the majority of the members of the team shall prevail and act on behalf of the team unless the resolution of the tribal council certifying the team specifically provides otherwise.

Sec. 3. (a) If, within one hundred and eighty days after the first session scheduled by the Mediator under subsection (c) of section 2, full agreement is reached, such agreement shall be put in such form as the Mediator determines best expresses the intent of the tribes and shall then be submitted to the Secretary and the Attorney General of the United States for their comments as they relate to the interest of the United States in the proceedings. These comments are to be submitted to the Mediator and the negotiating teams within thirty days. The negotiating teams and the Mediator shall then consider the comments and, if agreement can still be reached on terms acceptable to the negotiating teams and the Mediator within sixty days of receipt by him of the comments, the agreement shall be put in final written form and shall be signed by the members of the negotiating teams and the Mediator. The Mediator shall then cause the agreement to be entered into the records of the supplemental proceedings in the Healing case. The provisions of the agreement shall be reviewed by the District Court, modified where necessary, and put into effect immediately thereafter.

(b) If, within the one hundred and eighty day period referred to in subsection (a) of this section, a partial agreement has been reached between the tribes and they wish such partial agreement to go into effect, they shall follow the procedure set forth in said subsection (a). The partial agreement shall then be considered by the Mediator in preparing his report, and the District Court in making a final adjudication, pursuant to section 4.

(c) For the purpose of this section, the negotiating teams may make any provision in the agreement or partial agreement not inconsistent with existing law. No such agreement or any provision in it shall result in a taking by the United States of private property compensable under the Fifth Amendment of the Constitution of the United States.

SEC. 4. (a) If the negotiating teams fail to reach full agreement within the time period allowed in subsection (a) of section 3 or if one or both of the tribes are in default under the provisions of subsections (b) or (d) of section 2, the Mediator, within ninety days thereafter, shall prepare and submit to the District Court a report containing his recommendations for the settlement of the interests and rights set out in subsection (a) of section 1 which shall be most reasonable and equitable in light of the law and circumstances and consistent with the provisions of this Act. Following the District Court's review of the report and recommendations (which are not binding thereon) and any further proceedings which the District Court may schedule, the District Court is authorized to make a final adjudication, including partition of the joint use area, and enter the judgments in the supplemental proceedings in the Healing case.

(b) Any proceedings as authorized in subsection (a) hereof shall be assigned for hearing at the earliest possible date, shall take precedence over all other matters pending on the docket of the District Court at that time, and shall be expedited in every way by the Court.

SEC. 5. (a) For the purpose of facilitating an agreement pursuant to section 3 or preparing a report pursuant to section 4, the Mediator is authorized—

(1) notwithstanding the provisions of section 2 of the Act of May 25, 1918 (40 Stat. 570), to recommend that, subject to the consent of the Secretary, there be purchased or otherwise acquired additional lands for the benefit of either tribe from the funds of either tribe or funds under any other authority of law;

(2) to recommend that, subject to the consent of the Secretary, there be undertaken a program of restoration of lands lying within the joint use area, employing for such purpose funds authorized by this Act, funds of either tribe, or funds under any other authority of law;

(3) to recommend that, subject to the consent of the Secretary, there be undertaken a program for relocation of members of one tribe from lands which may be partitioned to the other tribe in the joint use area;

(4) to recommend, in exceptional cases where necessary to prevent personal hardship, a limited tenure for residential use, not exceeding a life estate, and a phased relocation of members of one tribe from lands which may be partitioned to the other tribe in the joint use area; and

(5) to make any other recommendations as are in conformity with this Act and the Healing case to facilitate a settlement.

(b) The authorizations contained in subsection (a) of this section shall be discretionary and shall not be construed to represent any directive of the Congress.

Sec. 6. The Mediator in preparing his report, and the District Court in making the final adjudication, pursuant to section 4, shall consider and be guided by the decision of the Healing case, under which the tribes have joint, undivided, and equal interests in and to all of the joint use area; by any partial agreement reached by the parties under subsection (b) of section 3; by the last best offer for a complete settlement as a part of the negotiating process by each of the tribes; and by the following:

(a) The rights and interests, as defined in the Healing case, of the Hopi Tribe in and to that portion of the reservation established by the Executive order of December 16, 1882, which is known as land management district no. 6 (hereinafter referred to as the "Hopi Reservation") shall not be reduced or limited in any manner.

(b) The boundary lines resulting from any partitioning of lands in the joint use area shall be established so as to include the higher density population areas of each tribe within the portion of the lands partitioned to such tribe to minimize and avoid undue social, economic, and cultural disruption insofar as practicable.

(c) In any division of the surface rights to the joint use area, reasonable provision shall be made for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes.

(d) In any partition of the surface rights to the joint use area, the lands shall, insofar as is practicable, be equal in acreage and quality: *Provided,* That if such partition results in a lesser amount of acreage, or value, or both to one tribe such differential shall be fully and finally compensable to such tribe by the other tribe. The value of the land for the purposes of this subsection shall be based on not less than its value with improvements and its grazing capacity fully restored: *Provided further,* That, in the determination of compensation for any such differential, the Federal Government shall pay any difference between the value of the particular land involved in its existing state and the value of such land in a fully restored state which results from damage to the land which the District Court finds attributable to a failure of the Federal Government to provide protection where such protection is or was required by law or by the demands of the trust relationship.

(e) Any lands partitioned to each tribe in the joint use area shall, where feasible and consistent with the other provisions of this section, be contiguous to the reservation of each such tribe.

(f) Any boundary line between lands partitioned to the two tribes in the joint use area shall, insofar as is practicable, follow terrain which will facilitate fencing or avoid the need for fencing.

(g) Any claim the Hopi Tribe may have against the Navajo Tribe for an accounting of all sums collected by the Navajo Tribe since September 17, 1957, as trader license fees or commissions, lease rental or proceeds, or other similar charges for doing business or for damages in the use of lands within the joint use area, shall be for a one-half share in such sums.

(h) Any claim the Hopi Tribe may have against the Navajo Tribe for the determination and recovery of the fair value of the grazing and agricultural use of the lands within the joint use area by the Navajo Tribe and its individual members, since September 28, 1962, shall be for one-half of such value.

Sec. 7. Partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal, oil, gas and all other minerals within or underlying such lands. All such coal, oil, gas, and other minerals within or underlying such lands shall be managed jointly by the two tribes, subject to supervision and approval by the Secretary as otherwise required by law, and the proceeds therefrom shall be divided between the tribes, share and share alike.

Sec. 8. (a) Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

(b) Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

(c) The Navajo and Hopi Tribes are hereby authorized to exchange lands which are part of their respective reservations.

(d) Nothing in this section shall be deemed to be a Congressional determination of the merits of the conflicting claims to the lands that are subject to adjudication pursuant to this section, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

(e) The Secretary of the Interior is authorized to pay any or all appropriate legal fees, court costs, and other related expenses arising out of, or in connection with, the commencing of, or defending against, any action brought by the Navajo or Hopi Tribe under this section.

Sec. 9. Notwithstanding any other provision of this Act, the Secretary is authorized to allot in severalty to individual Paiute Indians, not now members of the Navajo Tribe, who are located within the area described in the Act of June 14, 1934 (48 Stat. 960), and who were located within such area, or are direct descendants of Paiute Indians who were located within such area, on the date of such Act, land in quantities as specified in section 1 of the Act of February 8, 1887 (24 Stat. 388), as amended (25 U.S.C. 331), and patents shall be issued to them for such lands having the legal effect and declaring that the United States holds such land in trust for the sole use and benefit of each allottee and, following his death, of his heirs according to the laws of the State of Arizona.

Sec. 10. (a) Subject to the provisions of Section 9 and subsection (a) of section 17, any lands partitioned to the Navajo Tribe pursuant to section 3 or 4 and the lands described in the Act of June 14, 1934 (48 Stat. 960), except the lands as described in section 8, shall be held in trust by the United States exclusively for the Navajo Tribe and as a part of the Navajo Reservation.

(b) Subject to the provisions of section 9 and subsection (a) of section 17, any lands partitioned to the Hopi Tribe pursuant to section 3 or 4 and the lands as described in section 8 shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi Reservation.

SEC. 11. (a) The Secretary is authorized and directed to transfer not to exceed 250,000 acres of lands under the jurisdiction of the Bureau of Land Management within the States of Arizona or New Mexico to the Navajo Tribe: *Provided*, That the Navajo Tribe shall pay to the United States the fair market value for such lands as may be determined by the Secretary. Such lands shall, if possible, be contiguous or adjacent to the existing Navajo Reservation. Title to such lands which are contiguous or adjacent to the Navajo Reservation shall be taken by the United States in trust for the benefit of the Navajo Tribe.

(b) Any private lands the Navajo Tribe acquires which are contiguous or adjacent to the Navajo Reservation may be taken by the United States in trust for the benefit of the Navajo Tribe: *Provided*, That the land acquired pursuant to subsection (a) and this subsection shall not exceed a total of 250,000 acres.

SEC. 12. (a) There is hereby established as an independent entity in the executive branch the Navajo and Hopi Indian Relocation Commission (hereinafter referred to as the "Commission").

(b) The Commission shall be composed of three members appointed by the Secretary within sixty days of enactment of this Act.

(c) The Commission shall elect a Chairman and Vice Chairman from among its members.

(d) Two members of the Commission shall constitute a quorum. Any vacancy in the Commission shall not affect its powers, but shall be filled in the same manner in which the original appointment was made.

(e) Each member of the Commission who is not otherwise employed by the United States Government shall receive an amount equal to the daily rate paid a GS-18 under the General Schedule contained in section 5332 of title 5, United States Code, for each day (including time in travel) or portion thereof during which such member is engaged in the actual performance of his duties as a member of the Commission. A member of the Commission who is an officer or employee of the United States shall serve without additional compensation. All members of the Commission shall be reimbursed for travel, subsistence, and other expenses incurred by them in the performance of their duties.

(f) The first meeting of the Commission shall be called by the Secretary forthwith following the date on which a majority of the members of such Commission are appointed and qualified under this Act, but in no event later than sixty days following such date.

(g) Subject to such rules and regulations as may be adopted by the Commission, the Chairman shall have the power to—

(1) appoint and fix the compensation of an Executive Director, and such additional staff personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, but at rates not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title; and

(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $150 a day for individuals.

(h) The Department of the Interior shall furnish, on a nonreimbursable basis, necessary administrative and housekeeping services for the Commission.

(i) The Commission shall cease to exist when the President determines that its functions have been fully discharged.

SEC. 13. (a) Within the twenty-four month period following the date of issuance of an order of the District Court pursuant to section 3 or 4, the Commission shall prepare and submit to the Congress a report concerning the relocation of households and members thereof of each tribe, and their personal property, including livestock, from lands partitioned to the other tribe pursuant to sections 8 and 3 or 4.

(b) Such report shall contain, among other matters, the following:

(1) the names of all members of the Navajo Tribe who reside within the areas partitioned to the Hopi Tribe and the names of all members of the Hopi Tribe who reside within the areas partitioned to the Navajo Tribe; and

(2) the fair market value of the habitations and improvements owned by the heads of households identified by the Commission as being among the persons named in clause (1) of this subsection.

(c) Such report shall include a detailed plan providing for the relocation of the households and their members identified pursuant to clause (1) of subsection (b) of this section. Such plan (hereinafter referred to as the "relocation plan") shall—

(1) be developed to the maximum extent feasible in consultation with the persons involved in such relocation and appropriate representatives of their tribal councils;

(2) take into account the adverse social, economic, cultural, and other impacts of relocation on persons involved in such relocation and be developed to avoid or minimize, to the extent possible, such impacts;

(3) identify the sites to which such households shall be relocated, including the distance involved;

(4) assure that housing and related community facilities and services, such as water, sewers, roads, schools, and health facilities, for such households shall be available at their relocation sites; and

(5) take effect thirty days after the date of submission to the Congress pursuant to subsection (a) of this section: *Provided, however,* That the Commission is authorized and directed to proceed with voluntary relocations as promptly as practicable following its first meeting.

SEC. 14. (a) Consistent with section 8 and the order of the District Court issued pursuant to section 3 or 4, the Commission is authorized and directed to relocate pursuant to section 8 and such order all households and members thereof and their personal property, including livestock, from any lands partitioned to the tribe of which they are not members. The relocation shall take place in accordance with the relocation plan and shall be completed by the end of five years from the date on which the relocation plan takes effect. No further settlement of Navajo individuals on the lands partitioned to the Hopi Tribe pursuant to this Act or on the Hopi Reservation shall be permitted unless advance written approval of the Hopi Tribe is obtained. No further settlement of Hopi individuals on the lands partitioned to the Navajo Tribe pursuant to this Act or on the Navajo Reservation shall be permitted unless advance written approval of the Navajo Tribe is obtained. No individual shall hereafter be allowed to increase the number of livestock he grazes on any area partitioned pursuant to this Act to the tribe of which he is not a member, nor shall he retain any grazing rights in any such area subsequent to his relocation therefrom.

(b) In addition to the payments made pursuant to section 15, the Commission shall make payments to heads of households identified in the report prepared pursuant to section 13 upon the date of relocation of such households, as determined by the Commission, in accordance with the following schedule:

(1) the sum of $5,000 to each head of a household who, prior to the expiration of one year after the effective date of the relocation plan, contracts with the Commission to relocate;

(2) the sum of $4,000 to each head of a household who is not eligible for the payment provided for in clause (1) of this subsection but who, prior to the expiration of two years after the effective date of the relocation plan, contracts with the Commission to relocate;

(3) the sum of $3,000 to each head of a household who is not eligible for the payments provided for in clause (1) or (2) of this subsection but who, prior to the expiration of three years after the effective date of the relocation plan, contracts with the Commission to relocate; and

(4) the sum of $2,000 to each head of a household who is not eligible for the payments provided for in clause (1), (2), or (3) of this subsection but who, prior to the expiration of four years after the effective date of the relocation plan, contracts with the Commission to relocate.

(c) No payment shall be made pursuant to this section to or for any person, who, after May 29, 1974, moved into an area partitioned pursuant to section 8 or section 3 or 4 to a tribe of which he is not a member.

SEC. 15. (a) The Commission shall purchase from the head of each household whose household is required to relocate under the terms of this Act the habitation and other improvements owned by him on the area from which he is required to move. The purchase price shall be the fair market value of such habitation and improvements as determined under clause (2) of subsection (b) of section 13.

(b) In addition to the payments made pursuant to subsection (a) of this section, the Commission shall:

(1) reimburse each head of a household whose household is required to relocate pursuant to this Act for the actual reasonable moving expenses of the household as if the household members were displaced persons under section 202 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (84 Stat. 1894);

(2) pay to each head of a household whose household is required to relocate pursuant to this Act an amount which, when added to the fair market value of the habitation and improvements purchased under subsection (a) of this section, equals the reasonable cost of a decent, safe, and sanitary replacement dwelling adequate to accommodate such household: *Provided*, That the additional payment authorized by this paragraph (2) shall not exceed $17,000 for a household of three or less and not more than $25,000 for a household of four or more, except that the Commission may, after consultation with the Secretary of Housing and Urban Development, annually increase or decrease such limitations to reflect changes in housing development and construction costs, other than costs of land, during the preceding year: *Provided further*, That the additional payment authorized by this subsection shall be made only to a head of a household required to relocate pursuant to this Act who purchases and occupies such replacement dwelling not later than the end of the two-year period beginning on the date on which he receives from the Commission final payment for the habitation and improvements purchased under subsection (a) of this section, or on the date on which such household moves from such habitation, whichever is the later date. The

payments made pursuant to this paragraph (2) shall be used only for the purpose of obtaining decent, safe, and sanitary replacement dwellings adequate to accommodate the households relocated pursuant to this Act.

(c) In implementing subsection (b) of this section, the Commission shall establish standards consistent with those established in the implementation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (84 Stat. 1894). No payment shall be made pursuant to this section to or for any person who, later than one year prior to the date of enactment of this Act, moved into an area partitioned pursuant to section 8 or section 3 or 4 to a tribe of which he is not a member.

(d) The Commission shall be responsible for the provision of housing for each household eligible for payments under this section in one of the following manners:

(1) Should any head of household apply for and become a participant or homebuyer in a mutual help housing or other homeownership opportunity project undertaken under the United States Housing Act of 1937 (50 Stat. 888), as amended (42 U.S.C. 1401), or in any other federally assisted housing program now or hereafter established, the amounts payable with respect to such household under paragraph (2) of subsection (b) of this section and under subsection (a) of this section shall be paid to the local housing agency or sponsor involved as a voluntary equity payment and shall be credited against the outstanding indebtedness or purchase price of the household's home in the project in a manner which will accelerate to the maximum extent possible the achievement by that household of debt free homeownership.

(2) Should any head of household wish to purchase or have constructed a dwelling which the Commission determines is decent, safe, sanitary, and adequate to accommodate the household, the amounts payable with respect to such household under paragraph (2) of subsection (b) of this section and under subsection (a) of this section

shall be paid to such head of household in connection with such purchase or construction in a manner which the Commission determines will assure the use of the funds for such purpose.

(3) Should any head of household not make timely arrangements for relocation housing, or should any head of household elect and enter into an agreement to have the Commission construct or acquire a home for the household, the Commission may use the amounts payable with respect to such household under paragraph (2) of subsection (b) of this section and under subsection (a) of this section for the construction or acquisition (including enlargement or rehabilitation if necessary) of a home and related facilities for such household: *Provided*, That, the Commission may combine the funds for any number of such households into one or more accounts from which the costs of such construction or acquisition may be paid on a project basis and the funds in such account or accounts shall remain available until expended: *Provided further*, That the title to each home constructed or acquired by the Commission pursuant to this paragraph shall be vested in the head of the household for which it was constructed or acquired upon occupancy by such household, but this shall not preclude such home being located on land held in trust by the United States.

(e) The Commission is authorized to dispose of dwellings and other improvements acquired or constructed pursuant to this Act in such manner, including resale of such dwellings and improvements to members of the tribe exercising jurisdiction over the area at prices no higher than the acquisition or construction costs, as best effects section 8 and the order of the District Court pursuant to section 3 or 4.

SEC. 16. (a) The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 8 and 3 or 4 subsequent to the date of the partition thereof.

(b) The Hopi Tribe shall pay to the Navajo Tribe the fair rental value as determined by the Secretary for all use by Hopi individuals of any lands partitioned to the Navajo Tribe pursuant to sections 8 and 3 or 4 subsequent to the date of the partition thereof.

SEC. 17. (a) Nothing in this Act shall affect the title, possession, and enjoyment of lands heretofore alloted to Hopi and Navajo individuals for which patents have been issued. Such Hopi individuals living on the Navajo Reservation shall be subject to the jurisdiction of the Navajo Tribe and such Navajo individuals living on the Hopi Reservation shall be subject to the jurisdiction of the Hopi Tribe.

(b) Nothing in this Act shall require the relocation from any area partitioned pursuant to this Act of the household of any Navajo or Hopi individual who is employed by the Federal Government within such area or to prevent such employees or their households from residing in such areas in the future: *Provided*, That any such Federal employee who would, except for the provisions of this subsection, be relocated under the terms of this Act may elect to be so relocated.

SEC. 18. (a) Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 3 or 4:

(1) for an accounting of all sums collected by either tribe since the 17th day of September 1957 as trader license fees or commissions, lease proceeds, or other similar charges for the doing of business or the use of lands within the joint use area, and judgment for one-half of all sums so collected, and not paid to the other tribe, together with interest at the rate of 6 per centum per annum compounded annually;

(2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands; and

(3) for the adjudication of any claims that either tribe may have against the other for damages to the lands to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: *Provided*, That the United States may be joined as a party to such an action and, in such case, the provisions of sections 1346 (a) (2) and 1505 of title 28, United States Code, shall not be applicable to such action.

(b) Neither laches nor the statute of limitations shall constitute a defense to any action authorized by this Act for existing claims if commenced within two years from the effective date of this Act or one hundred and eighty days from the date of issuance of an order of the District Court pursuant to section 3 or 4, whichever is later.

(c) Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this Act. Such actions may be commenced in the District Court by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof.

(d) Except as provided in clause (3) of subsection (a) of this section, the United States shall not be an indispensable party to any action or actions commenced pursuant to this section. Any judgment or judgments by the District Court in such action or actions shall not be regarded as a claim or claims against the United States.

(e) All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this Act.

SEC. 19. (a) Notwithstanding any provision of this Act, or any order of the District Court pursuant to section 3 or 4, the Secretary is authorized and directed to immediately commence reduction of the numbers of all the livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity of such lands, as determined by the usual range capacity standards as established by the Secretary after the date of enactment of this Act. The Secretary is directed to institute such conservation practices and methods within such area as are necessary to restore the grazing potential of such area to the maximum extent feasible.

(b) The Secretary, upon the date of issuance of an order of the District Court pursuant to sections 8 and 3 or 4, shall provide for the survey location of monuments, and fencing of boundaries of any lands partitioned pursuant to sections 8 and 3 or 4.

SEC. 20. The members of the Hopi Tribe shall have perpetual use of Cliff Spring as shown on USGS 7½ minute Quad named Toh Ne Zhonnie Spring, Arizona, Navajo County, dated 1968; and located 1,250 feet west and 200 feet south of the intersection of 36 degrees, 17 minutes, 30 seconds north latitude and 110 degrees, 9 minutes west longitude, as a shrine for religious ceremonial purposes, together with the right to gather branches of fir trees growing within a 2-mile radius of said spring for use in such religious ceremonies, and the further right of ingress, egress, and regress between the Hopi Reservation and said spring. The Hopi Tribe is hereby authorized to fence said spring upon the boundary line as follows:

Beginning at a point on the 36 degrees, 17 minutes, 30 seconds north latitude 500 feet west of its intersection with 110 degrees, 9 minutes west longitude, the point of beginning;

thence north 46 degrees west, 500 feet to a point on the rim top at elevation 6,900 feet;

thence southwesterly 1,200 feet (in a straight line) following the 6,900 feet contour;

thence south 46 degrees east, 600 feet;

thence north 38 degrees east, 1,300 feet to the point of beginning, 23.8 acres more or less: *Provided*, That, if and when such spring is fenced, the Hopi Tribe shall pipe the water therefrom the edge of the boundary as hereinabove described for the use of residents of the area. The natural stand of fir trees within such 2-mile radius shall be conserved for such religious purposes.

SEC. 21. Notwithstanding anything contained in this Act to the contrary, the Secretary shall make reasonable provision for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes.

SEC. 22. The availability of financial assistance or funds paid pursuant to this Act may not be considered as income or resources or otherwise utilized as the basis (1) for denying a household or member thereof participation in any federally assisted housing program or (2) for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled to under the Social Security Act or any other Federal or federally assisted program. None of the funds provided under this Act shall be subject to Federal or State income taxes.

Sec. 23. The Navajo and Hopi Tribes are hereby authorized to exchange lands which are part of their respective reservations.

Sec. 24. If any provision of this Act, or the application of any provision to any person, entity or circumstance, is held invalid, the remainder of this Act shall not be affected thereby.

Sec. 25. (a) (1) For the purpose of carrying out the provisions of section 15, there is herby authorized to be appropriated not to exceed $31,500,000.

(2) For the purpose of carrying out the provisions of subsection (a) of section 19, there is hereby authorized to be appropriated not to exceed $10,000,000.

(3) For the purpose of carrying out the provisions of subsection (b) of section 19, there is hereby authorized to be appropriated not to exceed $500,000.

(4) For the purpose of carrying out the provisions of subsection (b) of section 14, there is hereby authorized to be appropriated not to exceed $5,500,000.

(5) There is hereby authorized to be appropriated annually not to exceed $500,000 for the expenses of the Commission.

(6) There is hereby authorized to be appropriated not to exceed $500,000 for the services and expenses of the Mediator and the assistants and consultants retained by him: *Provided*, That, any contrary provision of law notwithstanding, until such time as funds are appropriated and made available pursuant to this authorization, the Director of the Federal Mediation and Conciliation Service is authorized to provide for the services and expenses of the Mediator from any other appropriated funds available to him and to reimburse such appropriations when funds are appropriated pursuant to this authorization, such reimbursement to be credited to appropriations currently available at the time of receipt thereof.

(b) The funds appropriated pursuant to the authorizations provided in this Act shall remain available until expended.

Sec. 26. Section 10 of the Act entitled "An Act to promote the rehabilitation of the Navajo and Hopi Tribes of Indians and a better utilization of the resources of the Navajo and Hopi Indian Reservations, and for other purposes", approved April 19, 1950 (64 Stat. 47:25 U.S.C. 640) is repealed effective close of business December 31, 1974.

Approved December 22, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 93-909 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 93-1177 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 120 (1974):
  Mar. 18, 29, considered and passed House.
  Nov. 26, Dec. 2, considered and passed Senate, amended.
  Dec. 10, House concurred in Senate amendments.

§12.2 Purpose.

(a) It is the purpose of the regulations in this code to provide protection through adequate Law Enforcement machinery, both civil and criminal, for those Indian persons residing within the boundaries of the Hopi-Navajo Indian Reservations as defined by the United States District Court for the District of Arizona. (A suit authorized by the Act of July 22, 1958, 72 Stat. 403, Pub. L. 85-547)

(b) The regulations in this code shall continue to apply until such time as a duly constituted joint governing body with fully delegated authority from their respective tribes prescribes and adopts a new code.

(c) Nothing in this code will prevent adoption by the governing body of ordinances applicable to the needs of the people residing in this area. After secretarial approval, such ordinances shall be controlling and the regulations of this part which may be inconsistent therewith shall no longer be applicable.

(d) The regulations in this code shall be enforced by the Court of Indian Offenses known as the Joint Use Court as provided in 25 CFR Part 12 et seq.

§12.13 Criminal jurisdiction.

(a) The Trial Court of the Joint Use Area shall have jurisdiction over all offenses enumerated in the Joint Use Law and Order Code when committed by any Indian within the Joint Use Area.

(1) All Indian persons employed by the Bureau of Indian Affairs shall be subjected to jurisdiction of the Joint Use Courts.

(b) The jurisdiction of the Joint Use Courts shall be exclusive of any other court. With respect to any offense enumerated herein over which a Federal Court may assert jurisdiction, the jurisdiction of the Joint Use Court shall be concurrent and not exclusive.

Subpart N—Land; Livestock and Area Regulation Offenses

§12.139 Branding livestock of another.

(a) A person who:

(1) Willfully brands or marks an animal with a brand or mark other than the recorded brand or mark of the owner of the animal; or

(2) Willfully alters or obliterates any brand or mark on any animal not his own with intent to convert the animal to his or some third person's use without the consent of the owner is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed one hundred and eighty (180) days or to pay a fine not to exceed five hundred ($500) dollars, or both.

§12.140 Cutting green timber without permission.

(a) A person who cuts or removes any green timber from lands within the Joint Use Area without written permission from the Project Officer or his representative is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed thirty (30) days or to pay a fine not to exceed thirty ($30) dollars, or both.

§12.141 Failure to control livestock diseases and parasites.

(a) A person who willfully refuses to dip or treat any livestock under his ownership or control in accordance with orders or directions initiated by authorized range management personnel of the Joint Use Area is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.142 Game violation.

(a) A person who knowingly kills, attempts to kill, or catches any deer or game animal within the Joint Use Area without the written permission from the Project Officer or his representative is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed thirty (30) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

(c) "Game animal" shall mean any animal for which the Hopi or Navajo Tribes require a tribal permit to hunt, kill, or catch.

§12.143 Grazing, introduction without a permit.

(a) A person who:

(1) Knowingly permits livestock under his ownership or control to graze upon lands within the Joint Use Area; or

(2) Willfully introduces or causes the introduction of any livestock into unalloted or unallocated lands within the Joint Use Area without a valid permit issued by authorized range management personnel is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.144 Livestock roundups.

(a) A person, who willfully hinders, harrasses, obstructs, or otherwise interferes with persons conducting roundups authorized by range management personnel, is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.145 Making false reports of stock owned.

(a) A person who:

(1) Knowingly makes a false report as to the total number of stock under his ownership or control; or

(2) Willfully refuses to report the number of stock under his ownership or control, when required or requested by authorized range management personnel, is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.146 Refusal to brand or mark livestock.

(a) A person, who willfully refuses to brand or mark any livestock under his ownership or control when required or requested by authorized range management personnel, is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.147 Refusal to dispose of cull or infected animals.

(a) A person, who willfully refuses to dispose of or remove any cull or infected animals designated for disposal or removal by authorized range management personnel, is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.148 Trespass—Inter-district.

(a) A person, who knowingly permits any livestock under his ownership or control to occupy or graze upon land allocated to another or land reserved by range management personnel for demonstration, administration or agricultural purposes, is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or pay a fine not to exceed one hundred ($100) dollars, or both.

§12.149 Unauthorized use of range.

(a) A person who willfully:

(1) Grazes livestock under is [sic] ownership or control in the Joint Use Area in excess of the number allowed under his grazing permit; or

(2) Refuses to graze livestock under his ownership or control in accordance with plans made public by authorized range management personnel is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.150 Unauthorized fencing.

(a) A person, who fences any land knowing such fencing is not authorized by range management personnel, is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.151 Violation of regulations.

(a) A person who willfully:

(1) Violates any provision of 25 CRF Part 153; or

(2) Violates or refuses to comply with lawful orders and directions issued by the Secretary of the Interior or his representatives for the purpose of regulating the use or occupancy of the Joint Use Area is guilty of an offense.

(b) A person found guilty under this section may be sentenced to imprisonment for a period not to exceed ninety (90) days or to pay a fine not to exceed one hundred ($100) dollars, or both.

§12.152 Other actions not precluded.

The arrest, conviction, or sentencing of any person for violating any provision contained in this part shall not preclude impoundment, seizure, or other authorized action taken by range management personnel for the enforcement of regulations for, or management of, the Joint Use Area.

§151.15 Assignment, modification, and cancellation of permits.

(a) Grazing permits shall not be assigned, subpermitted, or transferred without the consent of the contracting parties, including the surety, and the approval of the Superintendent.

(b) The Superintendent may revoke or withdraw all or any part of a grazing permit by cancellation or modification on 30 days' written notice for violation of the permit or because of termination of trust status of permitted land. In case of cancellation or modification because of trust termination the action shall be effected on the next annual anniversary date of the grazing permit following the date of notice.

(c) The Superintendent may revoke or withdraw all or any part of a grazing permit by cancellation or modification on 180 days' written notice for allocated Indian use or for grazing exempt from permit pursuant to §151.8. Unless otherwise mutually agreed upon by the interested parties, such actions shall be effected on the annual anniversary date of the grazing permit following the date of notice except when such timeliness of notice is not possible, in which case deferment of the intended action shall not be required to extend beyond 180 days from the date of the notice. Rental fees for grazing privileges taken for allocation shall not be less than those paid by the preceding permittee.

§152.4 Regulations; scope; exceptions.

The grazing regulations in this part apply to all lands within the boundaries of the Navajo Reservation held in trust by the United States for the Navajo Tribe and all the trust lands hereafter added to the Navajo Reservation. The regulations in this part do not apply to any of the area described in the Executive order of December 16, 1882, to individually owned allotted lands within the Navajo Reservation nor to tribal purchases, allotted or privately owned Navajo Indian lands outside the exterior boundaries of the Navajo Reservation.
[34 FR 14599, Sept. 19, 1969]

§153.3 Purpose.

These regulations are issued to carry out the Secretary's trust responsibility of conserving range resources, promoting their proper use and affording equal utilization of these Joint Use Area resources by both tribes according to the judgment in Healing v Jones and subsequent proceeding thereafter. The regulations of this Part 153 apply only to the Navajo-Hopi Joint Use Area of the 1882 Executive Order Area. Parts 151 and 152 do not apply to the Navajo-Hopi Joint Use Area.

§153.17 Livestock trespass.

In addition to any criminal liability, the owner of any livestock grazing in trespass on the Joint Use Area is liable to a civil penalty of $1 per head for each animal thereof for each day of trespass, together with the reasonable value of the forage consumed and damages to property injured or destroyed. The Project Officer shall take action to collect all such penalties and damages and seek injunctive relief when appropriate. All payments for such penalties and damages shall be divided equally between each tribe and credited to them. The following acts are prohibited:

(a) The grazing upon or driving across any of the Joint Use Area of any livestock without an approved grazing or crossing permit.

(b) Allowing livestock to drift and graze on lands without an approved permit.

(c) The grazing of livestock upon lands within an area closed to grazing of that class of livestock.

(d) The grazing of livestock by permittee, upon any land withdrawn from use for grazing purposes to protect it from damage by reason of the improper handling of the livestock, after the receipt of notice from the Project Officer of such withdrawal, or refusal to remove livestock upon instructions from the Project Officer when an injury is being done to the Indian lands by reason of improper handling of livestock.

§153.19 Impoundment and disposal of unauthorized livestock.

Unauthorized livestock within any range unit of the Joint Use Area which are not removed therefrom within the periods prescribed by this regulation may be impounded and disposed of by the Project Officer as provided herein.

(a) When the Project Officer determines that unauthorized livestock use is occurring and has definite knowledge of the kind of unauthorized livestock, and knows the name and address of the owners, such livestock may be impounded anytime 5 days after written notice of intent to impound unauthorized livestock is mailed by certified or registered mail or personally delivered to such owners.

(b) When the Project Officer determines that unauthorized livestock use is occurring but does not have complete knowledge of the number and class of livestock or if the name and address of the owner thereof are unknown such livestock may be impounded anytime 15 days after the date of notice of intent to impound unauthorized livestock is first published in the local newspaper, posted at the nearest chapter house and in one or more local trading posts. The notice will identify the area or areas in which it will be effective.

(c) Unauthorized livestock on the Joint Use Area which are owned by persons given notice under paragraph (a) of this section, and any unauthorized livestock in areas for which a notice has been posted and published under paragraph (b) of this section, may be impounded without further notice anytime within the twelve-month period immediately following the effective date of the notice or notices given under paragraphs (a) and (b) of this section.

(d) Following the impoundment of unauthorized livestock, a notice of sale of impounded livestock will be published in the local newspaper, posted at the chapter house and in one or more local trading posts. The notice will describe the livestock and specify the date, time and place of sale. The date set shall be at least 5 days after the publication and posting of such notice.

(e) The owner may redeem the livestock anytime before the time set for the sale by submitting proof of ownership and paying for all expenses incurred in gathering, impounding and feeding or pasturing the livestock.

(f) If the livestock are not redeemed before the time fixed for their sale, they shall be sold at public sale to the highest bidder, provided his bid is at or above the minimum amount set by the Project Officer. If a bid at or above the minimum is not received, the livestock may be sold at private sale at or above the minimum amount, reoffered at public sale, condemned and destroyed, or otherwise disposed of. When livestock are sold pursuant to this regulation, the Project Officer shall furnish the buyer a bill of sale or other written instrument evidencing the sale.

(g) The proceeds of any sale of livestock as provided herein shall be applied as follows: First, to the payment of all expenses incurred by the United States in gathering, impounding, and feeding or pasturing the livestock. Second, in payment of any penalties or damages assessed pursuant to §153.17 of this part which penalties or damages shall be divided equally between two tribes as provided in said section. Third, any remaining amount shall be paid over to the owner of said livestock upon his submitting proof of ownership. If any proceeds remaining after payment of the first and second items noted above are not claimed within one year from the date of the sale, such remaining proceeds will be divided equally between the two tribes owning he [sic] land.

§ 983. Duties, responsibilities and authority of Prosecutor

The Prosecutor shall:

(1) Report to the Chairman, Navajo Tribal Council on all activities of his office and be responsible to him for all administrative and operational matters not relating to the investigation and prosecution of suspects and cases.

(2) Investigate, prosecute and dispose of all cases within his jurisdiction, acting independently and upon his own authority within the guidance of law and professional ethics in the performance of his duties.

(3) Formulate overall administrative and operating policies of the Office of the Prosecutor and take action as he shall deem necessary for the accomplishment and enforcement thereof.

(4) Exercise supervisory control and direction of all sections under the Office of the Prosecutor.

(5) Represent the Office of the Prosecutor in executive level planning.

(6) Represent the Tribal government, within the areas of his responsibility and authority and as authorized by the Chairman of the Navajo Tribal Council, in its dealings and relations with all persons and organizations outside the Tribal government.

(7) Plan and participate with other areas of law enforcement toward full realization of benefits from federal and state programs for technical and financial assistance.

(8) Develop programs and budgets for the Office of the Prosecutor, conduct periodic reviews of program and budget execution of the Office of the Prosecutor and participate in overall program and budget review.

(9) Delegate authority to members of his staff.

(10) Conduct such special programs or projects as may be assigned by the Chairman of the Navajo Tribal Council not inconsistent with his duties and responsibilities listed herein.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CLARENCE HAMILTON, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in the executive order dated December 16, 1882,

Plaintiff,

vs.

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the executive order dated December 16, 1882; RICHARD G. KLEINDIENST, Attorney General of the United States, on behalf of the United States,

Defendants.

No. Civil 579
Prescott

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The above-entitled Court, comprised of three judges and convened in the manner authorized by Section 1 of the Act of July 22, 1958, 72 Stat. 402, and 22 U.S.C., Section 2284, rendered its final decision herein on September 28, 1962, 210 F. Supp. 125, affirmed, 373 U.S. 758, 83 S. Ct. 1559, 10 L.Ed. 2d 703. This supplemental proceeding petitions this court for its assistance in granting immediate

relief to enforce the judgment of the above-entitled Court against the parties who are bound by the judgment herein.

2. By order of this Court, Peter MacDonald was substituted in the place of Raymond Nakai as a party defendant herein, Clarence Hamilton was substituted in the place of Abbott Sekaquaptewa as a party plaintiff herein, and Richard Kleindienst was substituted in the place of John Mitchell as a party defendant herein.

3. Clarence Hamilton is a successor to Dewey Healing and to Abbott Sekaquaptewa as the duly elected and authorized chairman of the Hopi Tribal Council of the Hopi Indian Tribe and appears herein for and on behalf of said Tribe, including all villages and clans thereof and on behalf of any and all Hopi Indians claiming any interest in the lands involved in this action. (Tr. Vol. I, p. 58)

4. Peter MacDonald is the duly authorized successor to Raymond Nakai and Paul Jones as chairman of the Navajo Tribal Council of the Navajo Indian Tribe, defendant in said action for and on behalf of said Tribe and every member thereof, and for each and every Navajo Indian using and occupying, or who has or who has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands involved in this action.

5. Richard Kleindienst is the duly authorized successor to John N. Mitchell and Robert F. Kennedy, Attorney General of the United States, and a defendant herein.

6. This Court by its decree of September 28, 1962, held, among other things, as follows:

> The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided and equal rights and interests both as to the surface and subsurface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of Land Management District 6, as defined on April 24, 1943, such boundaries being described in paragraph 1 of this judgment, and title in and to all of that reservation except the described District 6, is accordingly quieted in the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, subject to the trust title of the United States, as a reservation.

7. On or about August 6, 1963, during a Hopi-Navajo Conference at the Valley Ho Hotel, 350 West Main Street, in Scottsdale, Arizona, the Hopi Tribe made demand upon Phileo Nash, the Commissioner of Indian Affairs, and other officials of the Department of the Interior of the United States Government and upon Raymond Nakai, the then chairman of the Navajo Tribe and other officials of the Navajo Tribe for possession and use of one-half of the surface rights, including all resources in and to all of the Executive Order Reservation of December 16, 1882, lying outside of the boundaries of Land Management District 6 as defined on April 24, 1943, the title to which was quieted in the Hopi Indian Tribe subject to the trust title of the United States, as a reservation. (Tr. Vol. I, pp. 146, 147, 148)

8. Beginning September 28, 1964, and through November 17, 1965, thirty-two applications for grazing permits on the Joint-Use Area were filed by Hopi Indians with the Bureau of Indian Affairs applying for 2,425 cow units, 54 horse units, making a total of 2,497 animal units, year long. (Tr. Vol. I, p. 113; Exs. 8, 9, 10, 11, 12, 13)

9. The Washington, D.C. office of the Bureau of Indian Affairs notified its Phoenix Area Office not to issue the grazing permits that had been applied for by the Hopi Indians. (Tr. Vol. I, p. 113)

10. On March 3, 1965, the acting Assistant Commissioner of Indian Affairs informed the Phoenix Area Director of the Bureau of Indian Affairs as follows:

> Reference is also made to your inquiry regarding grazing permits for Hopi livestock owners on the joint-use portion of the 1882 Executive Order Reservation. Until appropriate adjustments are worked out and the over-

> grazed conditions there corrected, the Bureau is not in a position to approve such permits. (Ex. 10)

The adjustments referred to by the acting Assistant Commissioner were never worked out and no permits have ever been issued to the Hopi Indians for use on the Joint-Use Area. (Tr. Vol. I, p. 118)

11. Five Hopi Indians, Abbott Sekaquaptewa, his mother, a brother and two uncles now run cattle in the lower Dinnebito southwest of Oraibi, inside District 6 and outside District 6 in the Howell Mesa area within the Joint-Use Area. (Tr. Vol. I, p. 140) The family has run their cattle in this area at least thirty-five years. (Tr. Vol. I, p. 140 — testimony of Emory Sekaquaptewa. (Tr. Vol. II, pp. 170-171)

12. On or about October 19, 1971, the secretary of the Coal Mine-Mesa Chapter of the Navajo Tribe wrote demanding that the Sekaquaptewa cattle be removed from the Joint-Use Area by October 26, 1971, and threatened that if the cattle were not removed, the Navajo people would take action to remove the cattle. (Ex. 28) The demand to remove was repeated between the same parties on or about January 3, 1972. (Ex. 29) The demand was resisted by Mr. Sekaquaptewa. (Ex. 30)

13. The Navajo Indians built a fence to keep Sekaquaptewa cattle out of the Joint-Use Area which fence was removed by the Hopi Indians. (Tr. Vol. I, p. 144; Behashone Begay testimony; Tr. Vol. II, p. 86)

14. On June 13, 1972, the Commissioner of Indian Affairs telegraphed the Hopi Tribal Chairman requesting and urging that the Hopis withdraw from District 3 in the Joint-Use Area to avoid violence. (Ex. 34)

15. Since 1962, some use of the Joint-Use Area has been made by various Hopis but such use has not been substantial. Hopi cattle have been found in several localities; Hopis have gathered wood in several areas; some water facilities have been developed by Hopis; and one farm is located within the Joint-Use Area.

16. Over a number of years, Navajos have mutilated Hopi livestock by cutting off their tails or ears; cattle have been shot; and a Navajo took a saddle from a boy being raised by the Sekaquaptewa family. (Tr. Vol. I, p. 144) Navajos have driven Hopi-owned cattle from the Joint-Use Area. (Tr. Vol. I, pp. 141, 144, 145; 93; Exs. 38, 39, 40)

17. The Navajo Tribe has denied the right of the Hopi Tribe to use or possess any of the surface of the Joint-Use Area. (Tr. Vol. I, p. 93; Ex. 35) Hopi stock in the Joint-Use Area has been termed "trespassing" by Bureau of Indian Affairs officials and ordered removed. (Tr. Vol. I, p. 100; Exs. 31, 32, 33, and 35)

18. Hopi use of the Joint-Use Area for grazing since September 28, 1962, has been less than 1% (Tr. Vol. I, p. 97) because of the harassment, mistreatment, verbal abuse and threats of the Navajos. (Tr. Vol. I, p. 99)

19. The Hopi Tribe has requested payment by the Navajo Tribe for Navajo use of the Hopi share of grazing in the Joint-Use Area but such requests have been denied (Exs. 1, 2, 3, 6, and 7) and the defendant Navajo chairman, on October 24, 1967, denied the Hopi Tribe had any right of joint use in the Joint-Use Area. (Ex. 7)

20. Demand was made upon the Assistant Secretary of the Interior by the Hopi Tribe on August 13, 1969, for Hopi use of its one-half interest in the Joint-Use Area but no benefits have been received since. (Tr. Vol. I, p. 83)

21. The Navajo Tribe, by resolution, on the 28th day of July, 1969, directed its chairman to exercise every effort to insure that a road in the Joint-Use Area be kept all Navajo, excluding rights of ownership by the Hopi Tribe. (Exs. 4 and 5)

22. Income from leases, licenses, taxes, and similar charges in the Joint-Use Area have been withheld from the Hopi Tribe by the Navajo Tribe. (Exs. 20, 21, 22, 23, 24, 25, 26; Tr. Vol. I, p. 133)

23. The Joint-Use Area still remains under superintendents who are under the jurisdiction of the Navajo Area Office, Bureau of Indian Affairs. (Tr. Vol. I, p. 138)

24. The defendant United States is the trustee and guardian of the property of the Navajo and Hopi Tribes, including the lands decreed by this Court to be held in trust by the United States for the joint use and benefit of the Hopi Tribe and the Navajo Indian Tribe, share and share alike. (Tr. Vol. I, p. 147)

25. As of 1968, the range in the Joint-Use Area was overstocked to the extent of 400% of its carrying capacity and it is in a poorer condition now. (Tr. Vol. I, pp. 39-40)

26. Since September 28, 1962, the Navajo Tribe has damaged and misused the Joint-Use Area by over grazing and the defendant United States of America has failed and neglected to take any action to control such misuse. (Tr. Vol. I, pp. 39-40)

27. Eighty percent (80%) of the range in the Joint-Use Area is in poor condition, producing only 0% to 25% of its maximum forage. Only 20% of the range in the Joint-Use Area is producing from 25% to 50% of its maximum. None of the range in the Joint-Use Area is in good or excellent condition. (Tr. Vol. I, pp. 33-34)

28. Since September 28, 1962, the defendant Navajo Tribe, and individual members thereof, have and do now continue to resist the efforts on the part of the Hopi Tribe and its members to gain possession or use of any portion of the surface of said lands outside of District 6 and continue to overgraze, misuse, and damage the lawful interest of the Hopi Tribe awarded by this Court. (Exs. 35, 1, 4, 7; Tr. Vol. I, pp. 93, 99, 108, 141, 144-45)

29. The defendant United States, by and through its officers, the Department of the Interior, the Bureau of Indian Affairs, employees and agents, since September 28, 1962, to the present time has vacillated, equivocated, delayed and denied the Hopi Tribe and its members any substantial possession or use of the surface of said Joint-Use Area. (Exs. 10, 31-35; Tr. Vol. I, pp. 83, 94, 100, 118, 133)

30. The defendant United States of America still continues to procrastinate, vacillate, and refuse to deliver to the Hopi Indians or to assist the Hopi Tribe in obtaining their one-half undivided interest in the surface of said Joint-Use Area outside of District 6, or the resources thereof, notwithstanding requests, supplications, and demands of the Hopi Tribe for such use and possession. (Tr. Vol. I, pp. 83, 94, 127, 133; Exs. 35, 18, 19, 34).

31. The acts and conduct of the defendants set forth in Findings 28 through 30, above, have amounted to an ouster of plaintiff from any use, possession, or enjoyment of the Joint-Use Area outside of District 6, or the resources thereof.

From the foregoing facts, the Court concludes:

CONCLUSIONS OF LAW

1. The plaintiff is entitled to an order of this Court directing the defendants to grant and permit the joint use and possession of the surface, including all resources, in and to all of the Executive Order Reservation of December 16, 1882, lying outside of the boundaries of Land Management District 6 as defined on April 24, 1943, to the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike.

2. The plaintiff is entitled to a further order directing the clerk of this Court to issue a Writ of Assistance to compel performance of the judgment of this Court, entered herein on September 28, 1962, and to allow the plaintiff, the Hopi Indian Tribe, to enter upon said Joint-Use Area and with the Navajo Tribe, to jointly and equally use and

benefit from the grazing forage and all other surface and subsurface resources of said area for the benefit of the respective members of said Tribes.

3. After hearing argument on Plaintiff's Proposed Relief, filed herein, this Court should make such further orders herein as may be necessary to achieve the use and enjoyment by the Hopi Tribe of their joint interest in and to the surface, including all resources, of the Joint-Use Area.

4. This Court makes no findings or conclusions herein as to the matters of accounting or restitution or as to the liability of the United States, if any, and to the extent this Court has jurisdiction, it expressly reserves such issues for later consideration and hearing.

DATED: September 1, 1972.

JAMES A. WALSH
United States District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CLARENCE HAMILTON, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in the Execuive Order dated December 16, 1882,

Plaintiff,

vs.

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf on any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882; **RICHARD G. KLEINDIENST**, Attorney General of the United States, on behalf of the United States;

Defendants.

No. Civil 579

PRESCOTT

ORDER OF
COMPLIANCE

The Plaintiff in the above-entitled action having filed his Petition for an Order and Writ of Assistance on March 13, 1970; and following an appeal and decision by the United States Court of Appeals for the Ninth Circuit and denial of a Petition for Writ of Certiorari by the Supreme Court of the United States on May 22, 1972, this Court heard and received evidence adduced by the parties hereto, and having adopted its Findings of Facts and Conclusions of Law herein on September 7, 1972, and having heard the arguments of the parties as to the proposed relief on September 30, 1972; and good cause appearing therefor,

IT IS ORDERED, ADJUDGED, AND DECREED:

That the Defendants be and they are hereby ordered and directed to grant and permit the joint use and possession of the surface, including all resources, in and to all of the Executive Order Reservation of December 16, 1882, lying outside of the boundaries of Land Management District 6 as defined on April 24, 1943, to the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Defendants shall forthwith commence reduction of livestock in the Joint-Use Area of the 1882 Executive Order Reservation, and within one (1) year from the date of this Order complete reduction of Navajo livestock to one-half (½) of the carrying capacity as determined by the Soil and Range Inventory of the 1882 Executive Order Reservation (exclusive of District 6) dated 1964.

2. Within one (1) year from the date of this Order a new Range Reconnaissance to determine the present carrying capacity of said area shall be completed by the United States, and immediately thereafter a further reduction of livestock to the actual carrying capacity shall be commenced by Defendants and be completed within six (6) months from such commencement.

3. Commencing one (1) year from the date of this Order, livestock may be grazed upon the Joint-Use Area of the 1882 Executive Order Reservation, only after new permits therefor have been issued by the Bureau of Indian Affairs, and all prior existing permits shall be deemed cancelled as

of that date. Thereafter, permits may be issued to either or both tribes or individual tribal members of said tribes as the respective tribal councils of said tribes shall direct.

4. Commencing one (1) year from the date of this Order, permits covering not more than one-half (½) of the carrying capacity shall be issued to the Navajo Tribe or members thereof, and permits covering not more than one-half of such carrying capacity shall be issued to the Hopi Tribe or members thereof. Neither tribe, including the members thereof, shall at any one time hold permits which in total cover more than one-half (½) of the carrying capacity.

5. From the date of this Order all income from said Joint-Use Area to the Navajo and Hopi Tribes, including but not limited to income from mineral production and sales, leases, trader license fees, rights-of-way grants, and licenses shall be divided equally between said tribes. However, profits and gains from livestock use permitted as hereinbefore provided shall be the sole property of the permittee. Grazing fees may be assessed and collected in the future by either tribe from individual permittees of the assessing tribe and shall inure to the benefit of said tribe without accounting to the other tribe.

6. The tribes shall exchange copies of all existing leases, easements, contracts, or other documents together with written descriptions of all oral agreements, which relate to the Joint-Use Area or businesses or improvements located thereon.

7. No new construction shall be permitted on the Joint-Use Area without a permit issued jointly by the two tribes, except that the Hopi Tribe shall be permitted to construct that number of dwellings or other improvements equal to those Navajo dwellings and other improvements which are presently existing or are now under construction in the Joint-Use Area.

8. Within sixty (60) days from the date of this Order the United States of America shall present to this Court for its approval a plan to facilitate and implement this Order with relation to prevention of damage to, and misuse of, the rangeland as specified in Paragraphs 1 and 2, above.

9. Within ninety (90) days from the date of this Order the United States of America shall present to this Court for its approval a plan to facilitate and implement this Order, except with relation to prevention of damage to, and misuse of, the rangeland.

10. The plans required by this Order shall take effect upon approval of such plans by this Court.

11. Should Congressional legislation be enacted ex (missing copy) conflicting with any of the specific provisions of this Order, this Court retains jurisdiction to make such changes and further orders as may be required to correlate this Order with any conflicting statutory provisions. All other provisions of this Order not in conflict with statutory provisions shall remain in full force and effect.

12. The Clerk of this Court shall issue a Writ of Assistance directing the Defendants herein to comply with the foregoing Order.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

That matters and issues concerning accounting and restitution and as to liability of the United States in respect thereto, if any, to the extent this Court has jurisdiction, are expressly reserved for later consideration and hearing.

DATED this 14 day of October, 1972.

JAMES A. WALSH
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CLARENCE HAMILTON, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hope Indian Tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882,

Plaintiff,

vs.

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882; **RICHARD G. KLEINDIENST**, Attorney General of the United States, on behalf of the United States,

Defendants.

No. Civil 579

PRESCOTT

WRIT OF ASSISTANCE

TO THE UNITED STATES MARSHAL OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, GREETINGS:

The Defendants, Peter MacDonald, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882, and Richard L. Kleindienst, Attorney General of the United States on behalf of the United States, by order of the Court herein dated the 14th day of October, 1972, having been commanded to compel performance of the judgment of this Court theretofore entered on the 28th day of September, 1962, and to allow the Hopi Indian Tribe for and on behalf of its members the joint use and possession of the surface, including all resources, in and to all of the Executive Order Reservation of December 16, 1882, lying outside of the boundaries of Land Management District 6 as defined on April 24, 1943, with the Navajo Indian Tribe, share and share alike, strictly in accordance with the terms of said Order, a copy of which is attached hereto and by reference made a part hereof,

NOW, THEREFORE, you are hereby commanded that immediately after the reception of this Writ, you serve the same upon the defendants, together with a copy of the Order of this Court, dated the 14th day of October, 1972, wherein said defendants are directed to grant and permit the joint use and possession of the surface, including all resources, in and to all of the Executive Order Reservation of December 16, 1882, lying outside of the boundaries of Land Management District 6 as defined on April 24, 1943, to the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, all according to the true intent and meaning of said judgment and order of compliance.

WITNESS, the Honorable James A. Walsh, United States District Judge, this 31 day of October, 1972.

JAMES A. WALSH
US District Judge

(SEAL)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CLARENCE HAMILTON, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882,
Plaintiff,

vs.

PETER MACDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages, and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882; RICHARD G. KLEINDIENST, Attorney General of the United States, on behalf of the United States,
Defendants.

No. Civ. 579 Pct.
(JAW)

ORDER

The defendant United States of America having filed herein on December 14, 1972, and January 17, 1973, respectively, its plans required by the terms of Paragraphs 8 and 9 of the court's Order of Compliance, filed herein on October 14, 1972, and hearing on said plans having been held herein on March 3, 1973, and the defendant MacDonald having filed herein his proposed plan on April 2, 1973, and the court now being fully advised in the premises,

IT IS ORDERED that the plans proposed by the defendant United States of America, as delienated and explained by the agent of the United States, Mr. Irving Schwartz, in his testimony herein on March 3, 1973, be and the same are approved and adopted herein.

IT IS ORDERED, FURTHER, that the plan proposed by defendant MacDonald and filed herein on April 2, 1973, be and the same hereby is disapproved.

DATED: April 23, 1973.

James A. Walsh
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Abbott Sekaquaptewa, etc., et al.,
Plaintiffs-Appellees,
vs.
Peter MacDonald, etc., et al.,
Defendants-Appellants.

Nos. 74-1936
74-2215

ORDER

Appeal from the United States District Court
for the District of Arizona

Before: KOELSCH and CHOY, Circuit Judges,
and EAST,* District Judge.

The above-designated appeals came on regularly for argument this day; however, it appears that during their pendency, the Congress of the United States enacted legislation (Act of December 22, 1974, 88 Stat. 1712) which may materially affect the issues or the disputes themselves.

IT IS ORDERED:

1. That both said appeals be forthwith remanded to the United States District Court for the District of Arizona for the limited purpose of giving further consideration to said matters in the light of the Act, and thereafter (unless the issues become mooted) to be returned to this court.

2. The parties shall promptly take and prosecute all proceedings looking to such further consideration and an early resolution of the cases.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Abbott Sekaquaptewa, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882, *Plaintiff*, vs. **Peter MacDonald**, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on behalf of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the lands described in the Executive Order dated December 16, 1882; **Edward H. Levi**, Attorney General of The United States, on behalf of The United States, *Defendants*.	ORDER RETURNING APPEALS NUMBERED 74-1936 and 74-2215 to Court of Appeals Civil No. 579 (JAW)

The United States Court of Appeals for the 9th Circuit, having remanded to this Court cases numbered 74-1936 and 74-2215, both appeals growing out of orders in the above-captioned case, for the limited purpose of giving further consideration to said matters in the light of the Act of December 22, 1974, 88 Stat. 1712, and thereafter to be returned to said Court of Appeals, unless the issues became mooted, and the Plaintiff Abbott Sekaquaptewa, having filed a Petition to determine the effect of said Act of December 22, 1974, upon the issues appealed, and the Defendant Peter MacDonald, having moved this Court for an Order modifying the previous orders of this Court, entered in this cause on October 14, 1972, January 25, 1974, and May 29, 1974, and said matters having come on for hearing on the 16th day of August, 1975, and the Court having heard the arguments of counsel and having considered the documents and briefs submitted by the Plaintiff, and the defendant Peter MacDonald, and being fully advised, the Court concludes:

1. That the Act of December 22, 1974, 88 Stat. 1712, and particularly Section 19 thereof, does not conflict, overrule or replace the previous orders of this Court and that said Act is entirely in harmony with this Court's orders involved in those appeals that have been remanded to this Court by the Court of Appeals.

2. That Section 19 of said Act directs the Secretary of the Interior to begin to do immediately what the Orders of this Court required, namely, the reduction of the livestock in the Joint Use Area. The Secretary is further ordered to complete such reduction to carrying capacity of such lands, as determined by the usual range capacity standards as established by the Secretary after the date of enactment of the Act.

3. That the Secretary's regulations regarding the Joint Use Area, which became effective August 1, 1975, if adhered to, will prevent overgrazing of the Joint Use Area, which is the same goal that the Court sought to attain by its orders which are involved in said appeals, and if, in spite of the regulations, livestock is being grazed without a permit, the Defendants, Peter MacDonald and the Navajo Tribe, have the obligation, under the Court's Orders to do what is possible to stop the excess grazing.

4. That nothing in said Act of December 22, 1974, or in the legislative history before the Court, specifically including the Report No. 93-1177 on the Senate Bill HR-10337, and the Congressional Record of the proceedings in the House on May 29, 1974, discloses any intention on the part of Congress to modify or alter the orders of this Court, but on the contrary, a proposed amendment, which would have superseded the orders of the Court immediately failed of passage.

In view of the foregoing conclusions and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED, that Cases Number 74-1936 and 74-2215, in the United States Court of Appeals for the 9th Circuit, are not mooted by the Act of December 22, 1974, 88 Stat, 1712, and the Clerk of the Court is directed to return to the United States Court of Appeals, Appeals Number 74-1936 and 74-2215, together with such additional parts of the record as may be designated by the parties to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that neither the Act of December 22, 1974, nor the legislative history thereof, disclose any intention on the part of Congress to modify or alter the Orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Motion of the Defendant MacDonald, for an order relieving him from responsibility for livestock reduction in the Joint Use Area and to modify the Orders of this Court, and to vacate the Court's previous findings that the Defendant MacDonald was in contempt with respect to the Court's orders concerning livestock reduction and new construction are hereby denied, and the motion to modify the Court's Order of October 14, 1972, so as to eliminate restrictions on Navajo construction in the Joint Use Area is denied.

DATED this 14 day of October, 1975.

James A. Walsh
DISTRICT JUDGE

NAVAJO-HOPI JOINT USE AREA

5-YEAR PLAN

For

Implementation of P.L. 93-531

Section 19(a)

Submitted By

William L. Benjamin
Project Officer

February 24, 1975

Joint Use Administrative Office
Flagstaff, Arizona

BACKGROUND & PROPOSED ACTIONS TOWARD COMPLYING WITH P.L. 93-531, Section 19 (a)

Joint Use Administrative Office

The Joint Use Administrative Office evolved from court and administrative actions starting in 1972. The U.S. and the Navajo Tribe were named as co-defendants in a suit brought by the Hopi Tribe to allow joint use and possession of the 1882 Executive Order Area, exclusive of District #6. This suit resulted in the Order of Compliance, October 14, 1972. Since the October 14, 1972 order, there have been several additional court actions:

1. The government's plan was heard in open court on March 3, 1973 and the Court Order of April 23, 1973, accepted the plan.

2. Hopi action on August 25, 1973, requested the court to cite the Navajo for Non-Compliance of the October 14, 1972 order in four principle areas.

1) Removal of livestock, 2) Exchange of documents, 3) Division of rentals, 4) Continued new construction.

At this hearing it was stipulated the exchange of documents and division of rentals since October 14, 1972, has been accomplished. The remaining two items continued under the Courts consideration.

3. On December 1, 1973, the U.S. petitioned the court for additional time to accomplish certain phases of the plan and the order. This was addressed particularly to the movement of the livestock. The Navajo Tribe joined the U.S. in this petition.

The Court denied the request for the extension of time on January 25, 1974. However, it reaffirmed the cancellation of grazing permits and the right for the U.S. to proceed with construction of the boundary fence.

4. Hearings were held April 20, 1974, on the items of the contempt citation not stipulated in August, 1973, holding the Navajo Tribe in contempt and assessing a fine of $250.00 per day, until the Navajo livestock numbers are reduced to 8139 sheep units yearlong. This order required the U.S. to complete an inventory of the improvements in the joint use area. The inventory was to be accomplished by aerial photographs or otherwise.

The Navajo Tribe has appealed each of the four actions of the Arizona District Court to the Ninth Court of Appeals. Two of these appeals have been heard and the Arizona District Court Actions were reaffirmed. They were the October 14, 1972 order and the April 26, 1973 order, accepting the government's plan. The other two actions are still pending before the Ninth Circuit Court.

The government as a co-defendant has accomplished the following items required by various court orders:

1. The plan for removal of livestock.

2. Distribution of rental.

3. Exchange of documents.

4. Completed and published range reconnaisance.

5. Negotiated and awarded a fence contract for 1/2 the total fence boundary. Negotiated for the remainder.

6. Negotiated, awarded and advanced funds on a contract to pay transportation costs associated with the removal of livestock.

7. Designated management areas with carrying capacities and invited each tribe to designate who are to receive temporary permits and where they are to run their livestock.

8. Began the planning phases of restoration.

The items that are currently requiring immediate attention of this office:

1. The New Grazing Regulations (25 CFR 153) and the Law and Order Code.

This office working with the Solicitor's Office has developed, prepared and published a set of new grazing regulations unique to the area and a new Law and Order Code. These are needed because no existing regulations or codes apply to the joint ownership of tribal trust lands.

2. Development of Protective and Judicial Services for the JUA.

A staff of 18 policemen have been recruited, trained and assigned duty stations in the JUA. Vehicles, communications, offices, and housing are being acquired. We are negotiating with the Navajo Tribe for detention facilities at Tuba City, Window Rock and Chinle. We have purchased court room facilities and are seeking detention facilities from the Hopi Agency. Clerks, judges, and dispatchers are being recruited and will be employed after instituion of the Law and Order Code.

3. The inventory of improvements and enumeration of residents.

Aerial photography, taken as a result of the court order, fails to supply needed detailed information. An on site enumeration is being conducted to obtain basic data, this basic data will be necessary for the Court, Tribal, or Legislative actions.

4. Administration of ongoing contracts.

a. Fence contracts, b. Livestock transportation contract; c. Halpenny (geological) contract, d. Aerial Photo Contract.

Implementation of P.L. 93-531, Section 19(a)

This section deals with the authority and directive to the Secretary to immediately commence reduction of livestock to established carrying capacity, and institute conservation practices to restore the grazing potential to the maximum extent feasible.

In planning for implementation, there are several factors which must be considered:

1. The plan must fit the resources available from the Act and from the present organization of the Bureau of Indian Affairs.

2. It must fit the geographical and physical characteristics of the area.

3. It must consider the time lapse between taking an individual's livestock; and the application of relocation benefits, which cannot occur until after partitionment. This lapse could be five years or more.

4. It must consider the impact to the Bureau's Social and Community Services Resources, when 10,000 to 12,000 people are faced with a sudden change in economic and social lifestyle. It must then be patterned to fit the available resources without causing a serious curtailment of these services to other Indian communities.

Land treatment and range restoration are best accomplished by considering watersheds and drainage areas as units to receive treatment. The Joint Use Area is divided into five drainages, running from northeast to southwest. The Joint Use Administrative Office has the nucleus of planning and operational staff to carry out reduction, fencing, water developments and range restoration on one drainage area per year. Other considerations are procurement of equipment, fencing materials, plant seeds, herbicides and other required materials to carry out the program. We find these in short supply and consequently our orders and deliveries are spread over long time intervals. These factors point toward a five year program to physically carry out the requirements of the Act with available resources.

The five year period fits into the human needs both social and economic, based on available Bureau resources. By treating one area per year, we are affecting approximately 20% of the population. The Bureau is then acting to care for 2,000 to 2,500 people per year over a five year period, rather than the entire 10,000 to 12,000 population at once. We feel that the Bureau can adequately deal with the accelerated economic and social needs of these people on a graduated scale over the five year period until the relocation benefits will apply.

The $10,000,000 authorized by Congress to carry out the requirements of this section is at best minimal. The plan as presented provides for full reduction of livestock, based on either impoundment or purchase programs. It includes cross fencing for livestock control purposes. Areas to be fenced are approximately 30,000 to 100,000 acres in size, which is far larger than required for management units. Water developments will be those which are vital for livestock distribution on the rangelands. Grass seeding and brush control can be applied to approximately 500,000 acres of the 1,800,000 acres in the joint use area. These acres were selected on the basis of better soils in climatic zones which will best respond to treatment. However, under present funding only 130,000 of the best acres is programmed for treatment. Lands not treated will be restored over a longer number of years by rest and natural revegetation.

After completion of the stock reduction program and restoration by unit, as explained in the five year plan, a conservationist will be assigned to carry out the management responsibilities in the completed unit. These responsibilities will include: enforcing the grazing regulations, maintaining improvements and evaluating the units forage restoration. As the forage improves in the unit, modifications to

the permitting system will allow controlled maximal utilization of the forage with improved yields. By using an intensive management approach in each unit, the number of years required to reach the ultimate forage production will be greatly reduced.

The livestock purchase program as proposed in the plan is offered as an alternative to impoundment. Under the impoundment program, an owner of livestock in trespass is given formal notification that his livestock are in trespass, and he has so many days to remove them or they will be subject to impoundment. If at the end of that time, we find the livestock still in the area, they will be impounded and held. The owner is again notified and he can redeem his livestock by payment of feed and impoundment costs, and showing that he will remove them from the trespass area. If he does not redeem them, they will be sold at public sale, feed and impoundment costs deducted and the balance (if any) will be given to the owner. The owner can expect very little return from this procedure. As an alternative, at the time of first formal notification, we will offer to purchase the livestock at 150% of fair market value. We will then transport the livestock to market for sale, thus recovering part of the Government's cost. We feel that the incentive payment will be a good investment. First, it offers the livestock owner an alternative with a good profit. Second, it will cut down on needed impoundment personnel and equipment. Third, it will cut down the need of law and order personnel to assist in the impoundment process; and finally, it will place the Government in the favorable position of lending assistance to Indian livestock owners.

Resources Presently Available

The Joint Use Administrative Office in Flagstaff, Arizona has the nucleus of the organization to carry out the program on the Joint Use Area. The organization is structured into four divisions. These are: (1) Administrative Support, (2) Natural Resources, (3) Law and Order and (4) Indian Community Services. There are twenty-one permanent positions and forty-nine temporary.

We have an agreement with the Navajo Army Depot, just west of Flagstaff, for 3,000 feet of building space and 90,000 feet of concrete pad space for storage of building materials and supplies. We have a very sophisticated radio communications system set up in the Joint Use Area which includes mountain top repeaters giving coverage of entire area. We presently operate on a 1.7 million dollar budget. There will be approximately $400,000 per year available from this for assisting in the implementation of the Act. The remainder is for on-going programs, which includes law and order protection for approximately 10,000 people, natural resource inventories and development planning; housing maintenance and monitoring, fencing inside and outside perimeters of the area and realty operations.

We propose to re-enforce the present organization by adding personnel and needed equipment and supplies to carry out the additional responsibilities of the Act. There will be a need for an additional 20 permanent and 32 temporary positions. We intend to accomplish physical programs mainly through contracting process with the Indian communities and tribes.

FIVE-YEAR PLAN
P.L. 93-531 Section 19 (a)

MISSION

1. Reduce livestock to allocated number.
2. Fence the management areas.
3. Apply restoration measures.
4. Issue livestock grazing permits to both tribes, apply conservation restrictions and enforce compliance.

SITUATION

Area- 56.4 miles by 68.9 miles - 1,822,082 acres
People- Approximately 10,000 to 12,000 people (mostly Navajos)

Stock- 47,300 Sheep + 28,380 lambs
21,700 Goats + 13,020 kids
6,800 Cows + 4,080 calves
4,800 Horses + 1,920 colts

TOTAL 120,200 Sheep Units

Carrying Capacity - 16,000 Sheep Units

PRESENT RESOURCES

Staff-Permanent
3 Administration
9 Law & Order
7 Natural Resources
2 Indian Services
21 Permanent

Temporary
5 Administration
21 Law & Order
9 Natural Resources
14 Indian Services
49 Temporary

(cont'd.)

PRESENT RESOURCES (cont'd)

Budget- 1.5 Million per ann.

Vehicles- 18 GSA
9 BIA

Space-
Office 3511 Ft. space Bank Bldg.
Bldg. storage 3200 Ft. space Army Depot
Pad 90000 Ft. space Army Depot

Communications-
Law & Order 10 Mobile Radios
3 Base stations
Range 14 Mobile Radios
5 Repeaters
2 Remote stations

PRESENT MISSION

Administration of JUA

1. Natural Resources:
   - Range
   - Realty
   - Rights
   - Development
2. Law & Order:
   - Judicial
   - Enforcement
   - Criminal Investigation
3. Indian Services:
   - Housing Coordination and Monitoring
   - Tribal Operations
   - Demographics

RESOURCE FROM ACT

Authorization Budget - $10,000,000
F.Y. 1976
Area 5a
Acres 231,634
Stock- Sheep 7,200 + 4320 lambs
Goats 3,300 + 1980 kids
Cows 1,000 + 600 calves
Horses 700 + 280 colts

(cont'd.)

RESOURCE FROM ACT (cont'd)

Total reduction cost		$1,126,925
Purchase Program	796,650	
Impoundment	330,275	
Total restoration		1,322,200
Fencing	497,700	
Water Developments	499,500	
Range Treatment	325,000	
Capital improvement other than restoration		130,000
TOTAL		$2,579,125

F.Y. 1977
Area 5a

Permit Issuance and Conservation Compliance	$ 30,000

Area 1 + 5b
Acres 434,136

Stock-			
Sheep	8,700	+ 5220	lambs
Goats	4,000	+ 2400	kids
Cows	1,300	+ 748	calves
Horses	900	+ 360	colts

Total reduction cost		1,360,992
1976 receipts from sale of livestock	533,800	
Additional purchase funds	449,192	
Total purchase program	982,992	
Impoundment	378,000	
Total restoration		1,454,400
Fencing	375,600	
Water Development	788,800	
Range Treatment	290,000	
Capital improvements other than restoration		130,000
TOTAL		$2,975,392

(cont'd)

F.Y. 1978
Area 5 + Area 1

Permit Review (Areas) Permit Issuance (Area 1) Conservation Compliance	$ 90,000

Area 2
Acres 511,185

Stock-			
Sheep	10,100	+ 6,060	lambs
Goats	4,700	+ 2,820	kids
Cows	1,500	+ 863	calves
Horses	1,000	+ 400	colts

Total reduction cost		$1,497,119
1977 receipts from sale of livestock	655,328	
Additional purchase funds	476,421	
Total purchase program	1,131,749	
Impoundment	365,370	
Total restoration		1,983,720
Fencing	468,100	
Water Developments	690,620	
Range Treatment	825,000	
Capital improvements other than restoration		130,000
TOTAL		$3,700,839

F.Y. 1979
Areas 5, 1 & 2

Permit Reviews (5 & 1) Permit Issuance Area 2 Conservation Compliance	120,000

Area 3
Acres 296,767

Stock-			
Sheep	9,600	+ 5,760	lambs
Goats	4,300	+ 2,580	kids
Cows	1,300	+ 748	calves
Horses	1,000	+ 400	colts

(cont'd.)

Total reduction cost		$1,408,549
1978 receipts from sale of livestock	754,499	
Additional purchase funds	293,050	
Total purchase program	1,047,549	
Impoundment	361,000	
Total restoration		1,276,000
Fencing	379,300	
Water Development	524,200	
Range Treatment	372,500	
Capital improvements other than restoration		130,000
TOTAL		$2,934,549

F.Y. 1980

Areas 5, 1, 2 & 3

Permit Reviews (5, 1 & 2)	
Permit Issuance (3)	
Conservation Compliance	150,000

Area 4

Acres 248,360

Stock- Sheep	11,700	+ 7,020	lambs
Goats	5,400	+ 3,240	kids
Cows	1,700	+ 977	calves
Horses	1,200	+ 480	colts

Total reduction cost		1,686,881
1979 receipts from sale of livestock	698,366	
Additional purchase funds	609,915	
Total purchase programs	1,308,281	
Impoundments	378,600	
Total restoration		1,357,400

(cont'd.)

Fencing	312,700	
Water Developments	519,700	
Range Treatment	525,000	
Capital improvements other than restoration		$ 130,000
TOTAL		$3,324,281

RECAP BY FISCAL YEAR 1976 TO 1980

F.Y. 1976		$ 2,579,125
1976 Receipts from sales of livestock	533,800	
F.Y. 1977		2,975,392
1977 Receipts from sales of livestock	655,328	
F.Y. 1978		3,700,839
1978 receipts from sales of livestock	754,499	
F.Y. 1979		2,934,549
1979 Receipts from sales of livestock	698,366	
F.Y. 1980		3,324,281
1980 Receipts from sales of livestock	872,193	
Total Program		$15,514,186
Less total receipts		3,514,186
Less regular program funds planned at 400,00 for restoration		2,000,000
FUNDS AUTHORIZED BY P.L. 93-531		$10,000,000

APPENDICES A

WATER DEVELOPMENT

Proper water distribution is a major tool in range utilization. All existing drilled wells, dug wells, springs and ponds have been located on an overlay of the Soil and Range Inventory.

The need for additional livestock water developments have been determined for sheep on a 1-1/2 to 2 miles spacing intervals on high productive sites and greater intervals for less productive sites such as thin breaks, steep shallow, etc.

One of the highest costs for each area is the repair and maintenance of existing water developments. This maintenance was calculated at $4,000/impoundment structures with 90% needing repair and 70% of drilled wells needing maintenance at a cost of $3,000 per well, and 80% of the springs needing repairs at $1,500/spring.

Cost of earth work for maintenance or construction of new impoundment, compacted with sheep foot and water, is calculated at $1.00 per cubic yard.

The cost of a new well is estimated to have a variable cost of $26/ft. depending on depth for drilling and casing. A fixed cost to equip the well was estimated to be $15,000 for a 27,000 gal. tank, trough, mill head, tower, bait-test, cement top casing and labor.

DETAILED COST ESTIMATE BY AREA

AREA 5a 1976

Existing

57 Impoundments x 90% x 4,000 cuyd x $1.00	$205,200
12 Springs x 80% x $1,500	14,400
16 Wells x 70% x $3,000	33,600

Now

14 Impoundments x 5,000 cuyd x $1.00	70,000
7 Wells 3 at 500 ft. 4 at 600 ft. 3,900 total feet x $26/ft.	101,300
5 x 15,000	75,000
	$499,500

AREA 5b And 1 1977

Existing

78 Impoundments x 90% x 4,000 cuyd x $1.00	$280,800
9 Spring x 80% x $1,500	10,800
25 Wells x 70% x $3,000	52,500

New

22 Impoundments x 5,000 cuyd x $1.00	110,000
7 Wells at 453.8 x $26	82,600
7 x 15,000	105,000
19 miles pipe line at $1.45/ft.	147,100
	$788,800

GRAND TOTAL	$3,022,800

AREA II 1978

Existing

80 Impoundments x 90% at 4,000 cuyd x $1.00	$288,000
3 Springs x 80% at $1,500	3,600
27 Wells x 70% at $3,000	56,700

New

11 Impoundments 5,000 cuyd x $1.00	55,580
8 Wells cost estimate as per Water Development Corp. Report	166,720
equipment at 15,000/well	120,000
	$690,600

AREA III 1979

Existing

29 Impoundments x 90% at 4,000 cuyd x $1.00	$104,400
5 Springs x 80% x $1,500	6,000
14 Wells x 70% x $3,000	29,400

New

10 Impoundments x 5,000 cuyd x $1.00	48,400
12 Wells at 500 ft. ea x $26/ft.	156,000
equipment at 15,000/well	180,000
	$524,200

AREA IV 1980

Existing	
64 Impoundments x 90% x 4,000 cuyd x $1.00	$230,400
14 Springs x 80% x $1,500	16,800
15 Wells x 70% x $3,000	31,500
New	
14 Impoundments x 5,000 cuyd x $1.00	68,500
5 Wells x 750 ft. ea x	97,500
$26/ft. equipment at 15,000/well	75,000
	$519,700

Population and Livestock Numbers Projection

The projection was made using the known information gathered by the enumeration survey teams in Quad 125 to project the number of improvements, improvements occupied (families), number of sheep, number of cattle, and number of horses present on the entire Joint Use Area. The basic assumption made in the projection of livestock numbers is that the number of livestock is directly proportional to the number of families. There are 314 known families in Quad 125. (From the enumeration survey) Different factors were obtained for the ratio of families to sheep, families to cattle, and families to horses and then used to project total livestock numbers.

The ratio of sheep to goats was calculated by using the JUA livestock count obtained by the Navajo Tribe in 1972 and 1973.

Ten percent was added to the livestock numbers to account for unreported information (refusal or not at home), and the final figures were rounded off. The total number of livestock reported by the Navajo Tribe in 1972 converted to sheep units is 125,127. The number of projected livestock converts to 120,200 sheep units which is within 4% of the number reported by the Navajo Tribe.

People and Livestock Projection

Quadrangle 125 enumeration data was used to project improvements and livestock numbers per 1/4 Quad.

$$\begin{array}{rl} 3{,}042 & \text{families} \\ \times\ 3.73 & \text{people/family} \\ \hline 11{,}347 & \text{people} \end{array}$$

To project how many new improvements per quarter quad:

1/4 Quad.	Total Improvements	Mapped Improvements	Diff.
079 SW	436	402	34
124 NE	47	37	10
125 NW	207	185	22
125 NE	127	105	22
122 SE	100	89	11
123 SW	17	14	3
123 SE	36	30	6
124 SE	167	155	12
125 SW	176	147	29
125 SE	254	213	41
	1,567	1,377	190

$$\text{Percent Difference} = \frac{190}{1567} \times 100 = 12.125\%$$

Applying 12.125% increase to each 1/4 Quad, Total No. of Improvements increases from 6686 to 7493.

Quad 125 used for Projection - No. of families directly proportional to the No. of livestock.

1/4 Quad	Total No. of Improvements	Improvements Occupied (No. of families)	No. of Sheep	No. of Cattle	No. of Horses	No. of Sheep Units
SE	254	100	2,369	162	127	3,652
SW	176	56	2,042	244	111	3,573
NE	135	61	1,044	127	80	1,952
NW	209	97	1,020	101	133	2,089
	744	314	6,475	634	451	11,266

40.568% decrease

No. of improvements: No. of families
254 x .40568 = No. of families

Families: Sheep
314 x 20.62102 = No. of sheep

Families: Cattle
314 x 2.01911 = No. of cattle

Families: Horses
314 x 1.43631 = No. of horses

Ratio of Sheep to Goats
Taken from 1972 and 1973 Navajo Tribe livestock count for the JUA.

$$\frac{133{,}669 \text{ sheep}}{42{,}049 \text{ goat}} = \frac{3.1789}{1}$$

10% added to livestock figures to acount for unreported information (refusal or not home)
Livestock figures also rounded off.

PURCHASE PROGRAM

The Government will buy all the livestock in the Joint Use Area that are not under permit and ship them to market. A 50% incentive will be paid to owners delivering their livestock to the Government at designated places. If the Government has to round up animals not covered by a permit, then the owner will get only the market value less expenses incurred by the Government.

The livestock numbers are based on the livestock projection previously discussed. The following ratios, average weight and natural increase figures are based on reservation averages and Coconino County Extension Service averages for the reservation.

Bull - Cow = 1 : 24
Cows over 2 yrs. :
Cows 2 yrs. & Under = 4 : 1
Calf crop = 60%
Lamb & Kid crop = 60%
Colt crop = 40%
Average weight -
Bull = 1,000 lbs.
Cow 2 yr + = 800 lbs.
Cow 2 yr - = 600 lbs.
Calf = 325 lbs.
Sheep & Goats = 120 lbs.
Lambs & Kids = 70 lbs.
Horses = 800 lbs.
Colts = 400 lbs.

The nearest market for goats is San Angelo, Texas and current market prices (January 1975) are:

Mature goats	-	$ .17 per pound
kids	-	.10 per pound

All other prices are based on market prices in Phoenix, Arizona as of January 1975 and are as follows:

Bulls	=	$0.30 per pound
Cows 2 yr. +	=	$0.15 per pound
Cows 2 yr. -	=	$0.17 per pound
Calves	=	$0.25 per pound
Sheep	=	$0.12 per pound
Lambs	=	$0.25 per pound
Horses	=	$0.14 per pound
Colts	=	$0.14 per pound

Feed costs were estimated at $65.00/ton of hay delivered to White Cone in the Joint Use Area.

Hauling and transportation costs were based on standard commercial inter and intrastate livestock hauling rates.

PURCHASE PROGRAM

Current market prices used:

	Bulls	at $	.30/lb	Avg.	Wt.	=	1,000 lbs	$300/hd
	Cows 2 yr+	at	.15/lb	"	"	=	800 lbs	120/hd
	Cows 2 yr-	at	.17/lb	"	"	=	600 lbs	102/hd
(60%)	Calves	at	.25/lb	"	"	=	325 lbs	81/hd
	Sheep	at	.12/lb	"	"	=	120 lbs	14/hd
(60%)	Lambs	at	.25/lb	"	"	=	70 lbs	18/hd
	Goats	at	.17/lb	"	"	=	120 lbs	20/hd
(60%)	Kids	at	.10/lb	"	"	=	70 lbs	7/hd
	Horses	at	.14/lb	"	"	=	800 lbs	112/hd
(40%)	Colts	at	.14/lb	"	"	=	400 lbs	56/hd

PURCHASE PROGRAM COSTS

		Number of Head		Market Value +50% Incentive	TOTAL to Owners
	Bulls	281	at	$450/hd	$ 126,450
	Cows 2 yr+	5,217	at	180/hd	939,060
	Cows 2 yr-	1,302	at	153/hd	199,206
(60%)	Calves	3,916	at	121.50/hd	475,794
	Sheep	47,300	at	21/hd	993,300
(60%)	Lambs	28,380	at	27/hd	776,260
	Goats	21,700	at	30/hd	651,000
(60%)	Kids	13,020	at	10.50/hd	136,710
	Horses	4,800	at	168/hd	806,400
(40%)	Colts	2,060	at	84/hd	173,040
					$5,267,220

COST BY RESTORATION AREA

Area	Grand Total To Owners	Recovery by Government	Net Cost to Government
5a	$ 796,650	$ 533,800	$ 262,850
5b and 1	982,992	655,328	327,664
2	1,131,749	754,499	377,250
3 and 6	1,047,549	698,366	349,183
4	1,308,281	872,193	436,088
TOTALS	$5,267,221	$3,514,186	$1,753,035

Part 2 -- Five Year Plan - Fencing Requirements

A determination was made of the fence construction needed to comply with Section 19 of Public Law 93-531 on the Joint Use Area. The Joint Use Area was divided into seven proposed restoration areas and the fencing required was determined on an area basis and set on a five year time table. Each restoration area was divided into management areas with fenced boundaries. These boundaries were placed along highways, roads, railroads, and whenever possible, along existing fences and natural barriers. Approximately 100 miles of fence are still needed to complete the fencing of the reservation boundaries and are included in this five-year plan. The accompanying table shows the miles of fence needed plus the corresponding costs on an area per year basis. The cost is calculated using a figure of $3,700 per mile of fence which is the current contract figure being used on the reservation boundary fencing contracts. No allowance has been made for a yearly inflation rate as the same cost per mile of fence was used throughout the five-year plan.

It must be noted that the miles of fencing needed shown on the table represents the minimum fencing required for isolation to carry out the livestock reduction and only a part of the land restoration. Intensive range management and conservation practices needed to restore the area to its potential

carrying capacity will no doubt require additional cross-fencing within management areas and should be included in the conservation treatments portion of the plan. Additional personnel needed will be included in General Plan.

TABLE 1. FENCING REQUIREMENTS PER YEAR-JOINT USE AREA

	MILES	COST
1976		
District 6		
North Boundary Fence	48	$177,600
Joint Use Area Boundary		
Northeast Portion Boundary Fence	53	196,100
Total Reservation Boundary Fence	101	$373,700
Restoration Area 5a		
Highway 264 Fence	20	$ 74,000
Highway 77 Fence	34	125,800
Road Fence		
Fence One R/W - To be Used as Management Unit Boundary	47	173,900
Management Unit Cross Fence	33.5	124,000
Total Area 5a Fence	134.5	$497,700
Total Fencing - 1976	235.5	$871,400

1977	MILES	COST
Restoration Area 5b Leupp Highway	24	$ 88,800
Road Fence Fence One R/W - To Be Used as Management Unit Boundary	4	14,800
Management Unit Cross Fence	11	40,700
Total Area 5b Fence	39	$144,300
Restoration Area 1 Shonto Road	16	59,200
Road Fence Fence One R/W - To Be Used as Management Unit Boundary	20	74,000
Management Unit Cross Fence	26.5	98,050
Total Area 1 Fence	62.5	$231,250
Total Fencing - 1977	101.5	$375,600
1978		
Restoration Area 2 Highway 264 Fence	4	14,800
Road Fence Fence One R/W - To Be Used as Management Unit Boundary	88	325,600

(cont'd.)

1978 (cont'd.)	MILES	COST
Management Unit Cross Fence	34.5	127,700
Total Area 2 Fence	126.5	$468,100
Total Fencing 1978	126.5	$468,100
1979		
Restoration Area 3 Pinon-Second Mesa Road Fence	16	$ 59,200
Road Fence Fence One R/W - To Be Used as Management Unit Boundary	48	177,600
Management Unit Cross Fence	38.5	142,500
Total Area 3 Fence	102.5	$379,300
Total Fencing 1979	102.5	$379,300
1980		
Restoration Area 4 Pinon Highway Fence	30	$111,000
Road Fence Fence One R/W - To Be Used as Management Unit Boundary	15	55,500

(cont'd.)

1980 (cont'd.)	MILES	COST
Mangement Unit Cross Fence	39.5	$146,200
Total Area 4 Fence	84.5	$312,700
Total Fencing 1980	84.5	$312,700
Total Fencing Five-Year Period	650.5	$2,407,000

1976

AREA 5a

Sage Brush Control 9040 acres x $25/acre = $226,000	$226,000.00
Range Interseeding 6,600 acres x $15/acre = $99,000	99,000.00
Area Total	$325,000.00

1977

AREA 5b

Sage Brush Control (None) Range Interseeding 13,000 acres x $15/acre = $195,000	$195,000.00

AREA 1

Sage Brush Control (None) Range Interseeding 6,300 acres x $15 acre = $95,000	95,000.00
Area Total	$290,000.00

1978

AREA 2

Sage Brush Control 21,000 acres x $25/acre = $525,000	$525,000.00

(cont'd.)

1978 (cont'd.)

Range Interseeding 20,000 x $15/acre = $300,000	$300,000.00
Area Total	$825,000.00

1979

AREAS 3 and 6

Sagebrush Control 8,300 acres x $25/acre = $165,000	
Area Total	$372,500.00

1980

AREA 4

Sagebrush Control 12,000 x $25/acre = $300,000	
Seeding 15,000 x $15/acre = $225,000	
Area Total	$525,000.00

APPENDIX T

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Clarence Hamilton, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Hopi Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882,

Plaintiff,

vs.

Peter MacDonald, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on Behalf of the Navajo Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Navajo Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882; **Richard G. Kleindienst**, Attorney General of the United States, on Behalf of the United States,

Defendants.

No. Civ.
579-PCT.
(JAW)

Government's
Proposed
Plan

LAND AND LIVESTOCK MANAGEMENT PLAN

Pursuant to Paragraph 8 of the Order of Compliance entered on October 14, 1972, in the case of *Hamilton v. MacDonald*, Civil No. 579, U.S.D.C., D. Arizona, the United

States herewith submits the following plan to facilitate and implement said Order with relation to prevention of damage to and misuse of rangeland.

1. *Paragraph 1 of Order*

(a) A Series of livestock sales will be conducted throughout Navajo country through which the dispersion of approximately 20 percent of 8,000 cattle, 5,000 horses and 63,000 sheep and goat units will be removed. This is a first step toward planned livestock improvement programs.

(b) During the one year from the date of Court Order (October 14, 1972), the remaining livestock be removed from the Executive Order reservation.

(c) Any livestock that are retained by Navajo families will be limited to those essential for daily livelihood and will not be permitted to graze on open range.

(d) All removed livestock will be maintained in dry lot production areas off the Executive Order area. To effectuate this concept, a management corporation will be organized to administer this project. Stockholders will be owners of livestock maintained in dry lot operation.

(e) New management units will be platted in the 1882 area so that land recovery programs can be implemented for future grazing use.

2. *Paragraph 2 of Order*

(a) In early spring of 1973 a range reconnaissance team will study to determine the present carrying capacity of the area. A target date for completion is proposed as June 1, 1973.

(b) Further reduction is not anticipated because mandatory limits will have been more than complied with. (Present BIA staffs will be temporarily detailed from Bureauwide to accomplish this.)

3. *Paragraph 3 of Order*

During the process of livestock removal from the Executive Order area, grazing permits will be terminated and no further permits will be issued to either tribe except as shall be deemed advisable by BIA range specialists. BIA will identify suitable grazing areas and recommend such areas to both tribes for issuance of permits in compliance with limitations imposed by proper land management principles.

4. *Paragraph 4 of Order*

The proposed management plan outlined in response to Paragraph 3 of the Order above, will include guidelines to comply with Paragraph 4 of the Order.

5. *Paragraph 5 of the Order*

The BIA in cooperation with both tribes will diligently pursue a program of identifying all income-producing agreements, etc., and determine an equal share plan to be effective as of October 14, 1972, and in future operations.

6. *Paragraph 6 of the Order*

Most of such documents should be on file with the BIA offices and, if not, under the cooperative management of the two tribes and BIA. Such documents will be interchanged.

7. *Paragraph 7 of the Order*

This will be worked out with both tribes regarding new construction and/or allowing the Hopi Tribe to exercise their perogative as stipulated by the order. However, for the BIA we assume that such restrictions will not be applicable in its attempt to initiate land recovery projects, whereever [sic] urgently needed.

December 14, 1972.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Clarence Hamilton, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Hopi Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882, *Plaintiff* vs. **Peter MacDonald**, Chairman of the Navajo Tribal Council of the Navajo Tribal Council of the Navajo Indian Tribe for and on Behalf of the Navajo Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Navajo Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882; **Richard G. Kleindienst**, Attorney General of the United States, on Behalf of the United States, *Defendants.*	No. Civ. 579-PCT. (JAW) Government's Proposed Plan

Pursuant to Paragraph 9 of the Order of Compliance entered on October 14, 1972, in the case of *Hamilton v. MacDonald*, Civil No. 579, U.S.D.C., D. Arizona, the United States herewith submits the following plan to facilitate and implement said Order, except with relation to prevention of damage to, and misuse of, the rangeland of the Joint-Use

Area, and particularly to facilitate and implement Paragraphs 5, 6 and 7 of said Order:

1. Within 30 days from the approval of this plan, each tribe will submit to the other tribe and to the Special Project Officer of the Flagstaff Field Office of the Bureau of Indian Affairs copies of all existing leases, easements, contracts or other documents, which relate to the Joint-Use Area or businesses or improvements thereon.

2. Within 30 days from the approval of this plan, each tribe will undertake to secure an amendment of each existing lease, easement, contract, or other document which relates to the Joint-Use Area or businesses or improvements thereon, so as to provide for the payment of any and all income therefrom to be made to the Bureau of Indian Affairs and remitted to the Special Project Officer of the Flagstaff Field Office. Such undertaking shall be concluded within 60 days from the date of this order.

3. The said Special Project Officer shall account for and pay over to each tribe an equal one-half of all income so received under, from and after October 14, 1972, all leases and other documents amended as provided in 2 above. With respect to income under any such leases and other documents not so amended, or prior to any such amendment, the receiving tribe shall pay over to the Special Project Officer one-half of all income received from and after October 14, 1972, and the Special Project Officer shall forthwith pay the same to the other tribe.

4. The income referred to in 2 and 3 above shall include but not be limited to income from mineral production and sales, leases, trader license fees, rights-of-way grants, and licenses shall be divided equally between said tribes. However, profits and gains from livestock use permitted as hereinbefore provided shall be the sole property of the permittee. Grazing fees may be assessed and collected in

the future by either tribe from individual permittees of the assessing tribe and shall inure to the benefit of said tribe without accounting to the other tribe.

5. The Special Project Officer of the Flagstaff Field Office shall make available for inspection by both tribes presently existing prints of high-level photography for the purpose of identifying existing improvements on the Joint-Use Area. If either tribe shall desire to undertake new construction on the Joint-Use Area, it shall notify the other tribe in advance and shall, if required by Paragraph 7 of the Order of October 14, 1972, obtain signed permission for such construction prior to its commencement.

January 17, 1973.

Supreme Court, U.S.
FILED
JAN 19 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-876

Peter MacDonald, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on Behalf of the Navajo Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Navajo Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882,

Petitioner,

v.

Abbott Sekaquaptewa, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Hopi Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882, and Edward H. Levi, Attorney General of the United States, on Behalf of the United States,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT ABBOTT SEKAQUAPTEWA IN OPPOSITION

JOHN S. BOYDEN
SCOTT C. PUGSLEY
1000 Kennecott Bldg.
Salt Lake City, Utah 84133
Attorneys for Respondent
ABBOTT SEKAQUAPTEWA

INDEX

Page

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

I. THE ORIGINAL ORDERS OF THE DISTRICT COURT UPON WHICH THE CONTEMPT CITATION IS BASED HAVE BEEN SUBJECT TO PRIOR APPEALS AND ARE NOT NOW PROPERLY SUBJECT TO REVIEW 7

II. THE ORDERS OF THE DISTRICT COURT, WHICH PETITIONER CONCEDES WERE NOT COMPLIED WITH, WERE SUFFICIENTLY CLEAR TO ENABLE PETITIONER AND THE NAVAJO TRIBE TO UNDERSTAND WHAT WAS REQUIRED OF THEM AND TO ACT ACCORDINGLY 9

Page

III. FEDERAL ADMINISTRATIVE PROCEDURES FOR THE CANCELLATION OF THE NAVAJO GRAZING PERMITS ARE NOT APPLICABLE IN THE CASE AT BAR 12

IV. NO CONGRESSIONAL INTENT EXISTED TO DIVEST THE DISTRICT COURT OF JURISDICTION OR WHICH WOULD HAVE REQURED THE DISTRICT COURT TO ACCEPT A PLAN OFFERED BY A PARTY BEFORE THAT COURT, CONTRARY TO THE PRIOR ORDERS OF THE COURT 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Hamilton v. MacDonald,
503 F.2d 1138 (9th Cir. 1974) 6, 8

Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1971)
cert. den. 406 U.S. 945 (1972) 5, 14

Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962)
aff'd 373 U.S. 758 (1963) 4, 9, 13

Longshoreman's Asso. v. Philadelphia Marine Trade Asso., 389 U.S. 64 (1967) 11

Page

Morton v. Mancari, 417 U.S. 535 (1974) 15

Sekaquaptewa v. MacDonald, No's 74-1936, 74-2215, and 76-1006 (9th Cir., filed September 27, 1976) 544 F.2d 396 ..... 7, 9, 10, 11, 16, 17

United States v. Kabinto,
456 F.2d 1087 (9th Cir. 1972) 14

United States Trust Co. v. New Mexico,
183 U.S. 535 (1902) 9

Winton v. Amos, 255 U.S. 373 (1921) 13, 14

Statutes:

Constitution of the United States
Article I, §8, cl. 3 15

5th Amendment 13

Act of July 22, 1958, 72 Stat. 403 ..... 2, 4, 6

Act of December 22, 1974, 88 Stat. 1712, 25 U.S.C. §640d 2, 14, 15, 16, 17

Administrative Procedures Act
5 U.S.C. §701(a)(2) 15

25 C.F.R. §151.15 (1976) 11, 12

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-876

Peter MacDonald, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe for and on Behalf of the Navajo Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Navajo Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882,

Petitioner,

v.

Abbott Sekaquaptewa, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe, including all Villages and Clans thereof, and on Behalf of any and all Hopi Indians Claiming any Interest in the Lands Described in the Executive Order Dated December 16, 1882, and Edward H. Levi, Attorney General of the United States, on Behalf of the United States,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT ABBOTT SEKAQUAPTEWA IN OPPOSITION

Respondent Abbott Sekaquaptewa, in his congressionally designated representative capacity for the

Hopi Indian Tribe and its individual villages, clans and members, submits this Brief in Opposition to the Petition for a Writ of Certiorari filed herein and respectfully states that no issue meriting plenary consideration by this court is present herein.

OPINIONS BELOW

544 F.2d 396

The opinion of the Ninth Circuit Court of Appeals (**App. A with Petition**) is not yet reported. The Orders of the Arizona Federal District Court which are affirmed by that opinion (App. B, C and D with Petition) are unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

Respondent does not believe that any constitutional provisions or federal regulations are reasonably involved. The two statutes involved, the Act of July 22, 1958, 72 Stat. 403 (App. F with Petition) and the Act of December 22, 1974, 88 Stat. 1712, 25 U.S.C. § 640d et. seq. (App. G with Petition) are special jurisdictional acts dealing with the resolution of land disputes between the Hopi and Navajo Indian Tribes.

QUESTIONS PRESENTED

1. Whether petitioner can obtain an additional opportunity for review of questions, upon which the contempt citation is based, when said questions could have been raised in former appeals that were unsuccessfully pursued.

2. Whether the orders of the district court, upon which the citation for contempt is based, were sufficiently clear to enable petitioner and the Navajo Tribe to understand what was required of them.

3. Considering the fact that the district court was proceeding under a special jurisdictional act and had, as parties before it, the United States, the Navajo Tribe, and all interested Navajo individuals, whether the district court was required to follow administrative regulations promulgated by an officer of one of the defendants, the United States, to implement its prior decrees cancelling Navajo grazing permits.

4. Whether orders of the district court concerning livestock reduction are superseded by conflicting plans of the Secretary of the Interior, acting under congressional mandate to immediately commence livestock reduction, when nothing in the Congressional act or in the legislative history discloses any intention on the part of Congress to modify or alter the orders of the district court or to limit its authority to enforce those orders.

STATEMENT OF THE CASE

This case arises from the continuing efforts of the Hopi Indian Tribe, through its congressionally designated representative, respondent Abbott Sekaquaptewa, to obtain the enjoyment of its joint, undivided and equal interest in and to the so-called Hopi-Navajo Joint Use Area, from the Navajo Tribe. See *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962) aff'd. 373 U.S. 758 (1963) (sometimes hereinafter referred to as "*Healing*").

Healing v. Jones, supra, was a quiet title action between the Hopi and Navajo Indian Tribes which proceeded under a special jurisdictional act, the Act of July 22, 1958, 72 Stat. 403 (App. F with Petition). The land subject to the quiet title action was the 1882 Executive Order Reservation in Northern Arizona, containing approximately 2,500 000 acres. Approximately one-fifth of this land was determined to be exclusively Hopi and title was quieted accordingly. The remaining four-fifths, occupied almost exclusively by Navajos, was declared to be held by the Hopi and Navajo Tribes on a joint, equal and undivided basis. This area is referred to as the "Joint Use Area." Title in the tribes, in both cases, was subject to the trust title of the United States.

The name Joint Use Area has not proved to be descriptive of events therein since the *Healing* decision. For approximately seven years after *Healing*, the Hopi Tribe tried informally to persuade the Navajo Tribe to deliver up one-half of the use and possession of the area to the Hopi Tribe and to get the Navajo Tribe to prevent the overgrazing by Navajo stockmen which was seriously depleting the Joint Use Area range. All such informal efforts failed, and the Hopi Tribe petitioned the United States District Court for Arizona in 1970 for a Writ of Assistance to force the Navajo Tribe to permit the Hopi Tribe to utilize its one-half interest in the Joint Use Area. The district court initially refused such relief, but was reversed by the United States Court of Appeals for the Ninth Circuit which held that a single judge of the Arizona Federal District Court could,

> Hear testimony from the parties and from representatives of the United States as to what the actual situation is, and can tailor the relief to be afforded to the facts that confront him, always bearing in mind that the objective is to achieve what the court has decreed, the exercise by the Hopi and the Navajo of their "joint, undivided and equal interests as to the surface and subsurface and all resources appertaining thereto [in the lands in question], subject to the trust title of the United States." *Hamilton v. Nakai*, 453 F. 2d 152, 162 (9th Cir. 1971).

Certiorari to review that decision was denied by this court. 406 U.S. 945.

Upon remand, the Arizona Federal District Court held a hearing, made findings (App. M with Petition), and issued an Order of Compliance (App. N with Petition) and Writ of Assistance (App. O with Petition) directing the reduction of Navajo livestock in the Joint Use Area, forbidding new Navajo construction in the Joint Use Area, cancelling all grazing permits in the Joint Use Area as of one year from the date of the Order, directing the government to conduct range reconnaissance surveys, and otherwise ordering that the Navajo Tribe and the government "grant and permit the joint use and possession" of all Joint Use Area lands by the Hopi Tribe (See App. N, pp. N-2 through N-4 with Petition).

Following the issuance of these orders, petitioner herein took an appeal from both the Order of Compliance and the Writ of Assistance to the United States Court of Appeals for the Ninth Circuit. Then, as now, petitioner appeared as a party as the congressionally designated litigation representative of any "Navajo . . . Indians claiming any interest in the area set aside by the Executive Order dated December 16, 1882" (Act of July 22, 1958; App. F with Petition). Despite the fact that the Order of Compliance specifically cancelled all grazing permits in the Joint Use Area as of one year from the date of the Order (See App. N, pp. N-2 and N-3 with Petition), no claim of any denial of due process rights nor of any need to comply with federal administrative regulations was made on that appeal. The Order of Compliance and Writ of Assistance were affirmed by the court of appeals without modification. See *Hamtion v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974).

Consolidated with the opinion in *Hamilton v. MacDonald*, was a separate appeal in which petitioner attacked the district court's approval of an implementation plan submitted by the government. As noted in the appellate court's opinion, that implementation plan restricted Navajo construction in the Joint Use Area and limited livestock grazing by individual Navajos to one-half or less of the Joint Use Area capacity (*Hamilton v. MacDonald, supra*, 503 F.2d at 1142). This order was also affirmed by the court of appeals without modification.

As a result of the failure of the petitioner and the Navajo Tribe to take any meaningful steps to reduce Navajo livestock in the Joint Use Area or prevent further unauthorized Navajo construction therein, the district court cited both petitioner and the Navajo Tribe for Contempt of Court on May 29, 1974 (App. C with Petition). The Petition herein concedes that, at the time the contempt citation was issued, there were almost fifteen times as many Navajo livestock grazing in the Joint Use Area as permitted by the court's orders and that there were at least twenty Navajo structures constructed in the Joint Use Area in violation of the courts orders. See Petition pp. 8-9.

Petitioner seeks review herein of the consolidated opinion of the court of appeals (*Sekaquaptewa v. MacDonald*, App. A with Petition) which affirmed, without modification, petitioner's attacks on three separate orders of the district court, including the contempt citation.

ARGUMENT

I

THE ORIGINAL ORDERS OF THE DISTRICT COURT UPON WHICH THE CONTEMPT CITATION IS BASED HAVE BEEN SUBJECT TO PRIOR APPEALS AND ARE NOT NOW PROPERLY SUBJECT TO REVIEW.

As noted above, the Order of Compliance (App. N with Petition) decreed several things, including reduction of Navajo livestock by a date certain, cancellation of all grazing permits in the Joint Use Area on a date certain, and forbade new construction in the Joint Use Area without permission from both Tribes. Since this order was issued, the petitioner has taken numerous appeals from every order of the district court. Included in these appeals was one specifically from both the Order of Compliance and the Writ of Assistance issued therewith. These orders were affirmed by the Ninth Circuit Court of Appeals, without modification, in its opinion in *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974).

Likewise, the *Hamilton v. MacDonald* opinion affirms an order of the district court approving a government plan which provided for a severe limitation on Navajo livestock grazing and limited Navajo construction, both in the Joint Use Area.

Respondent supmits that any review of the content of the orders of the district court upon which the contempt citation was based is not now timely. To the extent that the matters which petitioner now seeks to raise were not in fact raised in the prior appeals, petitioner is deemed to have waived any right to a review thereof.

This conclusion is required by the doctrine of the law of the case:

> The district court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this court of such an order is an adjudication that upon the fact [sic] of the petition a valid claim was presented, and is conclusive of such prima facie validity, *not merely against objections which were in fact made, but also against those which might have been made. United States Trust Co. v. New Mexico*, 183 U.S. 535, 539-40 (1902).

II

THE ORDERS OF THE DISTRICT COURT, WHICH PETITIONER CONCEDES WERE NOT COMPLIED WITH, WERE SUFFICIENTLY CLEAR TO ENABLE PETITIONER AND THE NAVAJO TRIBE TO UNDERSTAND WHAT WAS REQUIRED OF THEM AND TO ACT ACCORDINGLY.

The court of appeals has carefully examined petitioner's contentions regarding deficiencies in the contempt citation and has concluded as follows:

> The Court's Findings of Fact signed May 29, 1974, are supported by substantial evidence and fully justify the Court's Conclusions of Law which state: . . . (App. A, p. A-18 with Petition).

It is important to note that the district court judge making those findings, Judge James A. Walsh, was one of the original judges on the *Healing* three judge panel and has been involved with every stage of the lengthy proceedings herein.

The orders of the district court were clear and specific. The Order of Compliance directed that Navajo livestock be reduced to one-half of Joint Use Area carrying capacity by October 14, 1973 (App. N, p. N-2 with Petition). On August 25, 1973 the district court informed the parties as follows:

> "I am pointing out that the Court's Order of Compliance very definitely indicates that if it can't be done voluntarily that it is going to be done involuntarily. (Quoted by the court of appeals in its opinion. App. A, p. A-19 with Petition).

As noted at page 5 of the Petition, both the government and the petitioner moved the district court to extend the time for their compliance with the Order of Compliance to October 14, 1974 and October 14, 1975 respectively, and the district court denied both motions. Despite the numerous appeals taken by petitioner from the orders of the district court, petitioner has never succeeded in obtaining a stay of any of the court's orders herein. Petitioner's pleas of ambiguity regarding livestock reduction deadlines and procedures cannot reasonably be sustained. If reasonable ambiguity had existed, it was the petitioner's responsibility to immediately clarify the ambiguity. Petitioner acted at his own peril by failing to promptly obtain such clarification in light of the unambiguous language used by the district court.

Likewise, petitioner's claim of ambiguity regarding procedures to cancel livestock permits is not sustained by the record. The Order of Compliance specifically

states that "all prior existing [grazing] permits shall be deemed cancelled as of" October 14, 1973. The administrative regulations for which petitioner now claims some application (See App. I with Petition), apply only to the cancellation of permits by local authorities of the Bureau of Indian Affairs. No mention is made in the Order of Compliance of federal regulations or procedures. All Navajo permittees were before the court through their congressionally designated representative. If confusion resulted from this clear expression by the court, it was not the result of any ambiguity on the part of the court. The alleged subjective confusion of a disappointed litigant should not be equated with presumed judicial imprecision in light of the clear language used by the court herein.

It cannot reasonably be said that the orders of the district court are either "to vague to be understood," "unintelligible," or that the court's command "defies comprehension." (*Longshoreman's Asso. v. Philadelphia Marine Trade Asso.*, 389 U.S. 64, 76 (1967)). The petitioner knew he was required to reduce livestock and prevent construction in the Joint Use Area but, as the district court found, he and the Navajo Tribe failed to take "the reasonable measures within their power and available to them", nor have they "endeavored in good faith to comply with the Court's directions" (App. A, p. A-18 and App. C, p. C-7 with Petition).

The judge most intimately familiar with the situation has made the findings and cited petitioner; the appellate court has reviewed them in a detailed, well reasoned opinion. No reason exists for further review by this court.

III

FEDERAL ADMINISTRATIVE PROCEDURES FOR THE CANCELLATION OF THE NAVAJO GRAZING PERMITS ARE NOT APPLICABLE IN THE CASE AT BAR.

The petitioner has asserted that only the Secretary of the Interior could cancel grazing permits issued to Navajos in the Joint Use Area. See Petition, pp. 13 and 19. As noted above, the regulation which petitioner asserts is controlling on this matter, 25 CFR § 151.15 (App. I with Petition), by its own terms, applies only to cancellations by the local Bureau of Indian Affairs superintendents.

Petitioner's contention that these general regulations somehow apply to a federal court proceeding under a special jurisdictional act to quiet title and deliver possession to the parties entitled thereto, and in which the United States is a party defendant, is without substance. This is especially clear when it is remembered that the interests of all of the individual Navajos were before the court through their congressionally designated representative. This court has heretofore held that:

> It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. *Winton v. Amos*, 255 U.S. 373, 391 (1921).

The decision in *Winton v. Amos* provides a complete answer to petitioner's claim that individual Navajos are somehow denied due process of law by Congress' designating a tribal authority to represent all of their interests (which, as noted above, is a claim which was *not* raised in petitioner's initial appeal from the Order of Compliance). In *Winton v. Amos* a large group of Choctaw Indians appeared in litigation through a congressionally designated tribal representative.

> In authorizing the present suit, Congress evidently recognized that it was impracticable to bring before the court all interested individual Choctaws; hence, treating them as a class, it designated the representative who should defend for them, by analogy to the familiar practice in equity, . . . [I]t is sufficient to say that the regulation of this matter is clearly within the power of Congress, and that Congress acted within that power in constituting the governor of the Choctaw Nation the representative of the defendants, upon whom notice of the suit was to be served in their behalf, and designating the Attorney General of the United States as their attorney to appear and defend the suit. We are clear, therefore, that there is no substantial basis for the contention that the jurisdictional acts have the effect of depriving the Indians of their property without due process of law, and hence are in conflict with the 5th Amendment. . . . *Winton v. Amos, supra*, 255 U.S. at 392.

The Court of Appeals for the Ninth Circuit has, since the *Healing* decision, held that the findings in *Healing* were res judicata as to individual Navajos asserting rights in the Joint Use Area. See ***United States v. Kabinto,*** 456 F. 2d 1087 (9th Cir. 1972). The circuit court's opinion herein, which cites to ***Winton v. Amos*** (See App. A, p. A-13 with Petition), is entirely consistent with these authorities.

The district court had specific, independent authority from Congress to do whatever reasonably appeared necessary to deliver equal use, possession and enjoyment of the Joint Use Area to the Hopi Tribe. See ***Hamilton v. Nakai, supra,*** 453 F.2d 152. This authority was not withdrawn by Congress, but was expressly recognized as continuing by the Act of December 22, 1974 (App. G with Petition) (discussed in greater detail under IV below). All relevant parties were before the court — the Navajo individuals and the Secretary of the Interior as an agent of the United States. The district court concluded that the cancellation of the grazing permits was necessary to effect its purposes and clearly declare them cancelled as of a date certain. Such action was within its authority and not violative of anyone's constitutional rights.

Petitioner's assertion that the above quoted holding in ***Winton v. Amos*** regarding tribal representation of individual Indians has somehow been overruled is not even supported by the authorities cited by petitioner (See petition pp. 20-21, especially n. 12). Petitioner cites no authority dealing with the Indian context, let alone Indian grazing rights. Indeed, this court has recently reaffirmed that the plenary power of Congress over Indian affairs is sufficient to justify unique legislative treatment of Indians.

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, §8, cl. 3, provides Congress with the power to "regulate commerce — with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. *Morton v. Mancari,* 417 U.S. 535, 551-52 (1974).

The district court had full authority to cancel grazing permits without reference to federal administrative regulations.

IV

NO CONGRESSIONAL INTENT EXISTED TO DIVEST THE DISTRICT COURT OF JURISDICTION OR WHICH WOULD HAVE REQUIRED THE DISTRICT COURT TO ACCEPT A PLAN OFFERED BY A PARTY BEFORE THAT COURT, CONTRARY TO THE PRIOR ORDERS OF THE COURT.

Petitioner has demonstrated no support for his contention either that the Section 19(a) of the Act of December 22, 1974 (App. G, p. G-20 with Petition) divested the district court of jurisdiction to proceed to reduce livestock and restore the Joint Use Area ranges, or that it vested the Secretary of the Interior with discretion so as to bring into play the requirements of the Administrative Procedures Act (5 U.S.C. § 701 (a) (2)).

As fully reviewed by the opinion of the court of appeals (App. A, pp. A-8 through A-11 with Petition), neither the language of the 1974 Act, nor its legislative history support the petitioner's position on this issue. The language of Section 19(a) of the 1974 Act (App. G, p. G-20 with Petition) states that,

> "The secretary is authorized and directed to immediately commence reduction of the numbers of all livestock now being grazed upon the lands within the joint use area and complete such reductions to carrying capacity. . . . The Secretary is directed to institute such conservation practices and measures within such area as are necessary to restore the grazing potential of such area to the maximum extent feasible.

No discretion is granted; the Secretary is "directed" to proceed.

Both the district court (See App. R with Petition) and the court of appeals (See App. A, pp. A-9 through A-11 with Petition) carefully reviewed the legislative history of the 1974 Act to determine whether or not the jurisdiction of the district court had been limited by the 1974 Act. As stated by the court of appeals:

> It is clear that Congress contemplated the continued jurisdiction of the District Court in controlling the supplemental proceedings in the Healing case. Its continued reference to that case in the statute and the referral of settlement agreements or recommendations to the District Court for approval or modification discloses Congress' awareness of the continuing proceedings in the Healing cases. . . .
>
> The final bill as approved by the Senate and the House, evidences the fact that Congress did not intend to supercede the existing court orders but instead, to further them. (App. A, pp. A-9 and A-11 with the Petition).

In light of these reasoned conclusions, petitioner's gratuitous statements as to what Congress "clearly" intended are unpersuasive.

A further reference to the 1974 Act itself should be conclusive. Section 18(c) (App. G, p. G-19 and G-20 with Petition) expressly confirms the continuing ancillary jurisdiction of the district court:

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this Act. Such actions may be commenced in the District Court by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof.[1]

Given the continuing jurisdiction of the district court over the ancillary proceedings and the government, to conclude that the government can force a plan (App. S with Petition) onto the district court under which the government would take five additional years to do what it had been ordered to complete two years previous thereto is ludicrous. The congressional language and intent was that the government, through the Secretary of the Interior, proceed forthwith to do what the court had previously ordered it to do. Such intent has been found to be "clearly" established by two previous careful judicial reviews in the district court and court of appeals. No reason exists why this court should assume jurisdiction herein to repeat those efforts.

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[1] The term "District Court" is specifically defined by the 1974 Act to mean "the United States District Court for the District of Arizona." See Section 1(b) (App. G, p. G-2 with Petition).

CONCLUSION

Respondent Sekaquaptewa, on behalf of the Hopi Indian Tribe and its individual members, submits that petitioner has demonstrated no justification for submitting this matter to a further review by this court. The opinion of the court of appeals is well reasoned and reflects a careful and detailed review of both the underlying facts and relevant law. The opinion of the court of appeals and the orders of the district court are consistent with both the intent of Congress in passing the two relevant special jurisdictional acts, and with existing judicial precedent.

Almost fourteen years have passed since this court affirmed the Hopi right to equal use of the Joint Use Area lands. In those fourteen years the Navajos have prosecuted an appeal to the Supreme Court of the United States from the original decision, have appealed to the United States Court of Appeals six times, and have previously petitioned this court for a Writ of Certiorari. On each occasion their tactics have produced nothing but delays. The judicial decisions have been explicit and unequivocal. Never have the Navajos posted a bond or obtained a stay of execution. Nevertheless, they have, with unmitigated temerity defied the edicts of the Courts, denied the justice due the Hopi people, and tenaciously held a position that beckoned contempt proceedings.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN S. BOYDEN
SCOTT C. PUGSLEY
Attorneys for Respondent
Abbott Sekaquaptewa
1000 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-0800

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